Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

DR. KATE OSUALA,

Petitioner,

v.

COMMUNITY COLLEGE OF PHILADELPHIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of PA committed reversible error per se by ignoring stare decisis from this Honorable Supreme Court on point in this Title VII case and by ignoring said Circuit's own published Decision(s) following said Supreme Court precedent, in essence ignoring Supreme Court Rule 10(a) to purposely deny Petitioner Equal Protection of the Law.

Whether the United States Court of Appeals for the Third Circuit condoned fraud perpetrated upon the court by appellee, misrepresentation of the record by the Clerk of said Circuit and by the District Court and the threat directed by the United States District Court of the Eastern District of Pennsylvania towards Petitioner's counsel 6 ½ months after the instant appeal was filed.

Whether the United States Court of Appeals committed reversible error per se by condoning the said District Court's abuse of discretion re: its denial of Petitioner's Motion to amend her Complaint, its refusal to enforce Federal Rule of Civil Procedure 26 and said District Court's refusal to fulfill its obligation re: Federal Rule of Appellate Procedure 10(a)(c), purposely to chill Petitioner's fight for her rights under the Civil Rights Act of 1964 and as amended by the Civil Rights Act of 1991 and to chill and deny her First and Fourteenth Amendment rights.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Third Circuit Court of Appeals in this case.

OPINIONS BELOW

The Third Circuit opinion (App. A, 1a-9a) is unreported and unpublished. The district court opinion (App. B, 10a-33a), equally, was unreported and unpublished.

STATEMENT OF JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on May 23, 2001. The Court of Appeals entered an Order denying a timely (petition for rehearing and) petition for rehearing en banc on June 19, 2001 (App. C, 55a-56a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment, and, Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-5, 42 U.S.C. §§ 1981 and 1983, and the Pennsylvania Human Relations Act, 43 P.S. § 955.

The First Amendment states in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or . . . of the right of the people . . . to petition . . . for a redress of grievances.

The Fourteenth Amendment states in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny . . . the equal protection of the laws.

Title VII of the Civil Rights Act of 1964 in pertinent part provides that consideration of race, color, religion, sex or national origin in employment practices in educational institutions is impermissible, and, it precludes retaliation against employees who have opposed unlawful employment discrimination.

The 1991 Amendment to the Civil Rights Act of 1964, Section 1981 provides "All persons within the jurisdiction of the United States . . . shall have the same right . . . to the full and equal benefit of all laws . . . as is enjoyed by white citizens . . . which rights . . . are protected against impairment by nongovernmental discrimination and impairment under color of state law.

Section 1983 of the Civil Rights Act of 1871 provides that every person who . . . subjects . . . any citizen of the U.S. . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the person injured in an action at law . . .

The Pa. Human Relations Act, 43 P.S. Section 955, provides, in pertinent part that it is an Unlawful Discriminatory Practice for any employer to discriminate against an employee because of race or national origin, or, to discriminate against such individual with respect to the terms, conditions or privileges of their employment, and, to discriminate against such individual because they have opposed any practice prohibited by the Pa. Human Relations Act.

STATEMENT OF THE CASE

Dr. Kate Osuala is a Nigerian immigrant, black in race. She obtained her advanced degrees in the United States. She was an Assistant Professor/Librarian, Rank 6 and the Library's only Ph. D. when she was employed by appellee from 4/1/94 - 2/12/98. Her tireless, exemplary work secured for the Library obtained its Middle States Certification. She, as opposed to her Library colleagues, was sought by other faculty to teach classes on Africa and she taught Library-related courses. Her 1st 2 raises were huge. But then, she was fired, after complaining about discriminatory, disparate and retaliatory treatment, and complaining about her 2 white supervisors asking her "when are you going back to Nigeria, why don't you go back to Nigeria" and about with whom she slept at a seminar, her firing occurring just before she entered the contract renewal year which would have entitled her to tenure. Dr. Osuala was fired because of her national origin and race and for protected speech, not for performance, in direct violation of the Collective Bargaining Agreement and her Constitutional and statutory rights. Then she was the subject of a "wanted poster" posted about campus indicating she was banned and to be expelled from campus if she set

foot upon campus after her firing. Then, 27 months after her firing, she was the subject of an article in the Faculty Federation Newsletter, published in the American Federation of Teachers network, warning others not to engage in speech/ behavior as she had or risk termination, intended to further bar Dr. Osuala from her chosen field.

Petitioner timely filed suit. Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1343(a)(3). The District Court ignored the controlling Rules of Civil Procedure and Rules of Evidence and it ignored the controlling stare decisis from this Honorable Supreme Court and controlling precedent from the Court of Appeals when it granted respondent's Rule 56 Motion. The District Court ignored its duty to approve Petitioner's F.R.A.P. 10, Statement of the Evidence or Proceedings, and misstated in its unpublished Opinion the evidence actually presented by Petitioner in this case. Notably, it ruled Petitioner met the First 3 prongs of her prima facie case, then it usurped the jury's function to determine whether it believed the College's denial that Dr. Osuala's work was divided between 2 white females after her firing (the W-2 of one of these 2 being buried among the W-2's of another Librarian), this clearly being a genuine issue of material fact. It ignored the testimony of the white male Assistant to the President that despite alleged student complaints about Dr. Osuala, he (Muraskin, who was pivotal in her firing) made no attempt to involve the American-born black male Vice President of Student Life in investigating same. The District court ignored the testimony of 3 other tenured professors that white faculty engaged in "rude, obnoxious" behavior (speech) with no discipline, but Dr. Osuala was fired because she spoke and acted consistent with her strict chain-of-command Ibo culture. It ignored the fact that appellee's claims of insubordination were wholly

rejected by 2 levels of Unemployment Compensation authorities. It refused to enforce Rule 26 and abused discretion re: F.R.C.P. 15. Having no authority to ignore stare decisis from this Honorable Supreme Court, the District Court's decision is reversible per se, supervision by this Supreme Court being necessary. Moreover, stare decisis from this Court requires reversal.

Jurisdiction of the Third Circuit was invoked per 28 U.S.C. § 1291. Yet the Court of Appeals equally ignored stare decisis. Its unpublished Opinion simply mirrors that portion of the District Court Opinion addressing Appellant's prima facie case. It then condoned the fraud perpetrated by appellee's counsel and its Clerk, seeking to conceal appellee's failure to timely serve its Brief. Further, it condoned the threatening Order faxed by the District Court to Petitioner's African-American counsel 3/8/01, 6½ months after that Court lost jurisdiction here. Hence, we are left to infer that (as is known in the Eastern District of Pennsylvania) (1) as the Chief Judge of the Third Circuit is the brother-in-law of the Managing Partner of the firm defending appellee, and as the Third Circuit voted late last year to appoint a partner of that same firm to the Bankruptcy Court (App. G, 121a-124a), the familial/political connection and affinity between the Court of Appeals and the defense firm somehow is deemed by that Court to be superior to its duty to administer justice and its duty to follow and apply the law as that law is promulgated by the Supreme Court, and; (2) the Third Circuit feels it has no duty to address and correct fraud by respondent & Clerk re: F.R.A.P. 31 and an ultra vires threat direct towards Petitioner's African-American counsel by the District Court. Presumably, these lower courts believe that Petitioner cannot afford or dare to seek redress from this Honorable Supreme Court.

Dr. Kate Osuala's instant Civil Rights case is compelling. The Courts below recognize this because (1) they ignore any reference to her evidence, misstate the actual evidence and decided her case via unpublished Memoranda to scuttle review by this Honorable Supreme Court; (2) the District Court ignored its duty to approve of her unobjected to F.R.A.P. 10 Statement of the Evidence or Proceedings, because to Approve same would make the record even clearer that the Appellant made out her prima facie case, and, that appellee presented neither affidavits nor depositions supporting its Motion for Summary Judgment; (3) the Court of Appeals, despite its own published precedent following and applying stare decisis from this Honorable Supreme Court, placed its ties to the defense firm above administering justice.

Given Dr. Osuala's case, there is no wonder that black citizens of this country continue to find their rights chilled or obstructed in the federal courts, the courts whose very purpose is to enforce the laws of this great land. Since the courts below blatantly ignored stare decisis from this Honorable Supreme Court, they must and should be forcefully Reversed.

A. The Effect of Stare Decisis Ignored Below.

This Honorable Supreme Court changed the law last year as to a plaintiff's burden re: establishing a prima facie case and avoiding Summary Judgment in a Title VII case, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. __, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000). *Reeves*, reversing the grant of a Motion for Judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, was decided 2 months before the District Court decided appellee's instant Motion filed pursuant to Federal Rule of Civil Procedure 56.

The grant of a Rule 50 Motion being effectively the same as the grant of a Rule 56 Motion, *Reeves* is not only stare decisis but essentially directly on point with the instant matter. *Reeves* was cited by Appellant in her Proposed Jury Instructions, which the parties were ordered to submit the month before appellee's Rule 56 Motion was decided, and Appellant cited *Reeves* in her Answer to the Rule 56 Motion as well as throughout her Main Brief and Reply Brief to the Third Circuit.

Several years before *Reeves*, the Court of Appeals below decided 3 Title VII cases wherein it held, essentially, that it is not always necessary for Title VII plaintiffs to establish via direct evidence all 4 prongs of the prima facie case, so long as sufficient, substantial evidence was presented that the real reason for the adverse employment action suffered by an otherwise qualified minority was an illegal employment practice. *See Jackson v. University of Pittsburgh*, 826 F.2d 230 (3d Cir.1987); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3d Cir. 1997); *Olson v. General Electric Aerospace*, 101 F.3d 947 (3d Cir. 1999). Neither the District Court nor the Court of Appeals attempt to explain in their Opinions why they ignored/refused to follow these cases, because we are clearly correct in our interpretation of the holdings of these cases. Moreover, even if it were true that a black took over Dr. Osuala's duties after she was fired — which did not occur — precedent from the Third Circuit indicates that such would not, in and of itself, suffice to defeat Dr. Osuala's Title VII claims. *See Pivirotto v Innovative Systems*, Inc., 191 F. 3d 344 (3d Cir. 1999); *Hankins v. City of Philadelphia*, 189 F.3d 353 (3d Cir. 1999); *Showalter v. University of Pittsburgh Medical Ctr.*, 190 F.3d 231 (3d Cir. 1999). More notably, in another Title VII case decided after *Reeves*, before the Rule 56 Motion in Dr. Osuala's case

was decided, which case also involved a Rule 56 Motion, the Third Circuit followed *Reeves* and reversed the grant of the Rule 56 Motion in part, finding that a genuine issue of material fact existed to preclude Summary Judgment. *See Goosby v. Johnson & Johnson Medical, Inc.*, 228 F.2d 313 (3d Cir. 2000). Of course, the Third Circuit already ruled in an earlier case that a district court *was not free to* ignore decisional or statutory law in effect when deciding matters before it. *See Small v. Lehman*, 98 F.3d 762, 768 (3d Cir. 1996). So, the district court was not free to accept respondent's claim over Petitioner's as to whether someone outside her protected class replaced her; *that was and is a jury issue* which the courts below could not ignore, and they could not take that from the jury, per *Reeves*. As F.R.C.P. 26 mandates production of any documents pertaining to claims raised in the Complaint, and as production of the College's other Ph.D.'s W-2's would, as the College admits "harm the College" (*See* App. H, 145a-147a) because this evidence also meets her burden under *Reeves*, the district court's refusal to enforce Rule 26 was clear reversible error.

This Honorable Court's Decision in *Reeves* not only clarifies any ambiguity among the Circuits as to the requisites of the prima facie case, but also changed the law in at least 2 important respects. First, recognizing that presentation of direct evidence is often difficult for Title VII plaintiffs, this Court in *Reeves* held that Title VII plaintiffs may satisfy the prima facie case by presenting circumstantial evidence from which the jury may infer that the proffered reasons for the adverse employment action suffered by plaintiff was not the stated one(s) offered by the employer but said reasons are pretextual for the real, illegal reasons. 120 S. Ct. at 2106. Second, and more importantly, *Reeves* removed any discretion from the district court re: its review of the evidence

on a Rule 56 Motion. Under *Reeves*, the district court may not make credibility determinations re: the evidence, must draw all reasonable inferences in favor of the non-moving party, and must ignore all evidence favorable to the moving party which is hearsay/excludable under Federal Rules of Evidence 402-404, *i.e.* hearsay and alleged character evidence which a jury is not required to believe. 120 S. Ct. at 2110.

Under *Reeves*, hence, the district court was not free to accept respondent's unsworn claim that a black librarian assumed Petitioner's duties as opposed to Petitioner's assertion that 2 white females assumed her duties (App. B, 26a-27a) by affidavits or by deposition testimony as required by F.R.C.P. 56.Under *Reeves*, having already found that the parties agreed on the other prongs of the prima facie case, the district court was *required* to leave that genuine issue of material fact for the jury to resolve. 120 S. Ct. at 2110. Moreover, the district court was not free to ignore Petitioner's additional evidence satisfying her burden of proof re: the prima facie case under *Reeves*. As outlined in her F.R.A.P. 10 Statement (App. B, 34a-54a), Petitioner presented, inter alia, the testimony of 5 witnesses whose depositions were submitted as part of her Answer to the Rule 56 Motion (App. B, 37a-39a), whose testimony (as well as that of her supervisors' Arbitration testimony) was properly incorporated into her Answer to the Rule 56 Motion by reference as required by F.R.C.P. 7-11. The district court's and the Court of Appeals' assertions (App. B, 22a-24a and App. A, 5a) that the "only evidence" presented by Dr. Osuala was pages from Arbitration testimony, hence, simply are false. Nor was the district court free to ignore the Unemployment Compensation authorities' decisions that respondent failed to prove that Petitioner was in any way insubordinate

(App. B, 39a), nor free to ignore that the W-2s of the Library personnel had buried among them a W-2 of the 2nd white female who assumed Petitioner's duties after her firing in violation of Title VII (App. H, Appellant's Reply Brief, 153a-154a). Again, the district court ignored its duty to Approve Petitioner's F.R.A.P. 10 Statement, for to Approve same would underscore that the district court misstated the evidence and the record in its Opinion to intentionally — and without authority — refuse to follow and apply *Reeves*. This flagrant ignorance of stare decisis from this Honorable Supreme Court cannot be condoned if the rule of law has any meaning for African-American and African immigrant citizens of this country, and cannot be condoned if this country really champions Civil Rights of all of its citizens, naturalized and born here, into the 21st Century and beyond.

The instant Court of Appeals *followed Reeves* in 2000, in reversing the grant of a Rule 56 Motion, before the instant district court granted the Rule 56 Motion in Dr. Osuala's case. Again, *see Goosby v. Johnson & Johnson Medical, Inc.*, 228 F.3d 313 (3d Cir. 2000). So, the Court of Appeals here not only refused to follow its own precedent as cited at pages 7-8 above, but it ignored *Reeves* here notwithstanding the fact that it followed *Reeves* 1 year earlier. Why? Clearly, the Court of Appeals did not perform a plenary review here, as to do so would have required it to reverse the district court. Petitioner satisfied her burden re: the prima facie case per Third Circuit precedent and per *Reeves*. That the Court of Appeals condoned fraud upon the court by respondent's counsel and/or its Clerk and condoned an ultra vires threat directed by the district court towards Petitioner's black counsel (App. D, Clerk's Orders, 57a-58a, 62a-63a; App. F, Appellant's Motions to Strike, Complaints to Ch. Judge, Dist. Ct.'s ultra vires Order, 73a-118a) instead of adhere to its duty to administer

justice and enforce Civil Rights laws said Court is sworn to uphold should outrage this Honorable Supreme Court and warrants Reversal.

B. Proceedings Below.

Petitioner commenced the instant Title VII action on or about January 7, 2000. Her complaint was not responded to with Preliminary Objections but with an Answer and New Matter. The Answer denied that, inter alia, Petitioner was fired because of her national origin and race, denied that she was subjected to disparate treatment and denied that she was subjected to retaliation. The Answer denied that, after she complained of discriminatory, disparate and retaliatory treatment Petitioner was paid less than the respondent's other Ph.D.'s. The respondent did not voluntarily turn over any discoverable material, requiring several discovery Motions. The district court granted respondent's Motion for Protective Order as to production of the W-2's of the respondent's Ph.D.'s, the respondent indicating in said Motion that production "would harm the College". Since the W-2's at issue directly address an allegation in the Complaint, F.R.C.P. 26 removes any discretion from the district court and requires production. Hence the district court's refusal to enforce Rule 26 prejudiced Petitioner severely.

The district court denied Petitioner's Motion to Amend her Complaint, said Motion seeking to add as Additional Defendants her 2 immediate supervisors, the Assistant to the President and the former union President, as evidence acquired after discovery closed 5/15/00 (4 months after suit was filed) established that said individuals had engaged in ongoing retaliation against Petitioner over 2 years after she'd been fired, and hence, making these individuals liable to her

for damages for violating her rights under Title VII, Section 1981, § 1983 and the Pa. Human Relations Act 43 P.S. § 955. The district court's Order denying same is, in addition to being legally incorrect, is inconsistent with that part of its Opinion denying that part of respondent's Rule 56 Motion wherein respondent sought to have the Arbitration be given res judicata/collateral estoppel effect. The grounds for the Amended Complaint were not available to Petitioner (see Appellant's Main Brief, App. H, 143a-148a) nor raised by Petitioner in the Arbitration — as the district court's own Opinion states — and as no case law requires an Amended Complaint to be attached to a Motion for leave to file same, the denial of the Motion to Amend is contrary to F.R.C.P. 15 and unsupported by the record.

The district court required the parties to submit Pretrial Memoranda with Witness Lists (Factual, Damage, Expert), Motions in Limine, Proposed Jury Voir Dire, Proposed Jury Instructions, Expert Reports, a Proposed Verdict Sheet, all before it decided the Rule 56 Motion of respondent. Petitioner met all of these obligations. The district court, however, refused Petitioner's request for an extention of time to Answer the Rule 56 Motion, and instead of faxing its Order re: same (as it regularly did its Orders to respondent's counsel), it delayed mailing its Order (App. E, 66a-67a), leaving Petitioner only approximately 7 days within which to compile, prepare, finalize and file her Answer to the Rule 56 Motion. Petitioner, again, beat that deadline.

The district court held no hearings on the record disposing of the Motions and refused Oral Argument on the Rule 56 Motion. The district court granted the respondent's Rule 56 Motion on 8/15/00 and, though its Memorandum was "officially" Unpublished, it was circulated on the

Internet. Petitioner filed her Notice of Appeal 8/21/00. She submitted her F.R.A.P. 10 Statement of the Evidence or Proceedings to the district court for Approval, with no objection from respondent, 9/5/00. The district court refused to Approve same, despite F.R.A.P. 10(c). Petitioner timely filed her Main Brief and Appendix and served same upon respondent 1/18/01. Respondent made no attempt to file and serve its Brief & Supplemental Appendix by or before 2/17/01; it gave no excuse below for failing to file and serve same by Friday, 2/16/01. Respondent's Brief & Supplemental Appendix were never timely served. Rather, the Third Circuit's docket was manufactured to reflect "service by mail" 2/20/01. This was proven below to be false (*see* App. F, 73a-116a). The Third Circuit, connected to/having an affinity towards the defense firm as noted above (App. G, 121a-124a), condoned this fraud on the Court. The Third Circuit ignored its own precedent and ignored stare decisis from this Honorable Supreme Court, and instead of conducting a plenary review it adopted the opinion of the District Court in an Unpublished Memorandum of its own. Petitioner's Petition for Rehearing by a Court en banc was denied by Order issued 6/19/01. This Petition for Writ of Certiorari has timely followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS OF THE COURTS BELOW IMPERMISSIBLY IGNORED STARE DECISIS FROM THIS HONORABLE SUPREME COURT, IMPERMISSIBLY IGNORED PRECEDENT OF THE THIRD CIRCUIT ITSELF, CONDONED FRAUD AND THREATS AGAINST COUNSEL, ALL TO PURPOSELY CHILL PETITIONER'S ADVOCACY FOR HER RIGHTS AND TO DENY PETITIONER EQUAL PROTECTION OF THE LAW

It is important to commence our discussion here by pointing out that the courts below went out of their way to ignore *Reeves*. They simply have no authority or discretion to ignore decisional law promulgated by the United States Supreme Court, and their decisions ought to be summarily Reversed because of their refusal to follow stare decisis.

Moreover, as pointed out below, the district court relied upon cases which are factually and legally distinguishable from the instant case and inapposite to the instant case. *See* Petitioner's Main Brief below (App. H, 133a-138a, 141a-144a) and Petitioner's Reply Brief below (App. H, 151a-155a). The Third Circuit panel clearly condoned the misstatements of the evidence and of the record by the district court, and simply repeated same in its Memorandum Decision (App. A, 2a-8a). Curiously, the panel of the Third Circuit implies that it read Petitioner's Brief as to the retaliation claim (App. A, 7a-8a) but misstates that the "only evidence submitted" was the excerpts of the supervisors Arbitration testimony (compare App. A, 5a-7a with App. B, 37a-39a). Noting that Petitioner discusses retaliation against her throughout her Brief generally and specifically over several

pages (App. H, 138a-145a) the panel's contrary assertion lacks support in the actual record of this case. Moreover, this intentional misstatement of the record by the Third Circuit panel exposes the blatant falsity of its assertion as to "the only evidence" submitted by Petitioner. This is because it would be literally impossible for The Third Circuit panel to reach our discussion of the retaliation issue, without review of the discussion of the considerable evidence actually submitted by Petitioner below, in the form of 5 depositions which established that respondent's proffered reasons for the firing of Petitioner were pretextual, the memoranda focusing on her national origin and secretly returning "Know Africa Books" she'd ordered, Unemployment Compensation awards establishing that respondent's claim that Petitioner was fired because of insubordination failed to be proven, a May 2000 article published about her case evidencing ongoing retaliation against Petitioner by respondent and its employees, the pertinent part(s) of the Collective Bargaining Agreement, Petitioner's Personnel File, and the W-2's of the Library staff wherein was buried a W-2 of the 2nd white female who assumed part of Petitioner's duties after she was fired (*See* App. H, Petitioner's Main Brief, pp. 10-20, 135a-145a, and, App. H, Petitioner's Reply Brief, pp. 8-11, 153a-155a). As did the district court, the panel of the Third Circuit simply and impermissibly ignored Petitioner's evidence, directly contrary to the mandate of *Reeves*.

The panel of the Third Circuit apparently decided to ignore the law and to ignore the facts and evidence. It condoned the misstatements of the evidence and record by the district court and it condoned the fraud committed by respondent's counsel and the Clerk, presumably, because of its displeasure with Petitioner pointing out that the district court may have decided this case against a racial minority

on every ground upon which she sought relief but exercised its discretion more favorably for 2 white plaintiffs just months before it granted respondent's Rule 56 Motion in the instant matter, and to insulate the firm of its Chief Judge's brother-in-law. *See* App. H., Petitioner's Reply Brief, pp. 11-13, 156a-158a, and, App. F, 73a-120a. Obviously, someone connected with this case/the Third Circuit/Clerk of Courts sent a copy of Petitioner's Reply Brief to the district court. Why else would the district court, 6 ½ months after it lost jurisdiction, then — in writing — fax a threatening Order (App. F, 117a-118a) to Petitioner's counsel?

Interestingly, just this Spring another appeal from the same district court involved its 1999 dismissal of Section 1981 claims of black smokers, *Brown v. Philip Morris, Inc.*, __ F.3d __ , No. 99-1931 (3d Cir. 2001) (decided 5/17/01; cited in 5/18/01 *Legal Intelligencer*, pp. 1, 8). The same district court was affirmed by a 2-1 split, with the Visiting Judge being the dissenter and being the judge who would have allowed those plaintiffs to amend their complaint. Equally interesting is that, also this Spring, in a sexual harassment suit involving a Motion to Dismiss under F.R.C.P. 12(b), the Third Circuit denied the Motion and allowed that plaintiff leave to amend his complaint in the midst of deciding his appeal, in *Weston v. Pennsylvania*, 251 F.3d 420 (3d Cir. 2001). *Weston* was decided the day before a different panel issued its Unpublished Memorandum in our case. The reasons given by the courts below as to the denial of Petitioner's Rule 15 Motion to Amend her Complaint and as to the granting of respondent's Rule 56 Motion, hence, lack merit and the motives for their reasons must be critically questioned under the circumstances. Petitioner, like Weston, should have been allowed to Amend her Complaint, as the record developed during the 5 months after suit was filed showed

that the individuals she sought to join as additional defendants violated her rights under §§ 1981, 1983 and 955 of the Pa. Human Relations Act, and they and respondent are liable to her as a matter of law. *See Foman v. Davis*, 371 U.S. 178 (1962); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) and *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

The intent to prejudice Petitioner in her prosecution of this matter and to chill her advocacy of her statutory and Constitutional rights and to preclude her claims from impartial and objective analysis, for wholly improper reasons, is clear. Why else would the Clerk's issuance of an Order 2/20/01, which granted relief to respondent with no opportunity for Petitioner to be heard regarding same, be condoned and no action taken on either Petitioner's Motion to Vacate said Order or her Motion to Strike respondent's Brief and Supplemental Appendix re: respondent's violation of F.R.A.P. 31 and respondent's fraud on the Court as to its alleged service of its Brief / Supplemental Appendix upon Petitioner (*See* App. F, 73a-120a)? Why do we have Federal Rules of Civil Procedure and Appellate Procedure, if the lower courts herein involved believe neither they nor the respondent have to follow and obey same?

"Rude, obnoxious and insubordinate behavior" are 20th Century buzz words and are actually pretextual reasons for employers who engage in discriminatory, disparate and retaliatory treatment against racial minority employees who dare — despite being free-born in this country in the 20th Century such as Petitioner's African-American 45-yr. old counsel, or despite being free-born in the world's black-run and 2nd or 3rd richest oil producing nation such as Petitioner — dream that they enjoy the same First Amendment rights as whites, and who dare to confront whites subjecting them to discriminatory, disparate and retaliatory treatment.

"Rude, obnoxious and insubordinate behavior" is speech/expressive behavior. The Collective Bargaining Agreement in effect at respondent during Dr. Osuala's employment *forbade* disciplining faculty — Dr.Osuala — for speech/expressive behavior. *See* App. H, 125a-127a and App. B, 37a). Hence, not only is it clear that the Third Circuit did not conduct a plenary review, or any real review of Petitioner's evidence, it is clear that it condoned the clear violations of Petitioner's rights under §§ 1983, 1981, Title VII, and the First and Fourteenth Amendments. And, again, it ignored stare decisis from this Honorable Supreme Court and its own precedent, just as the Fifth Circuit ignored evidence in *Reeves*.

In *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968), this Honorable Supreme Court held that public employees retain First Amendment rights, and in determining whether an action against an employee violates the First Amendment, the federal courts must balance the interests of the public employee against the interest of the state in promoting the efficiency of the public services it performs through its employees. *Id* at 1734-1735. As respondent plead below that its status as a quasi-governmental entity provides it immunity from punitive damages, this same status makes its actions to violate Petitioner's First Amendment rights reviewable under *Pickering*.

The Third Circuit, moreover, held supervisory liability attaches for a constitutional violation where the supervisor acted deliberately, willfully or recklessly, or with actual knowledge or acquiescence. *See Baker v. Monroe Township*, 50 F.3d 1186, 1194 n.5 (3d Cir. 1995). In fact, earlier in 2001, the Third Circuit has held that, in an educational setting

there is "no question" that unpopular speech, even if offensive to some, gets Equal Protection. *See Saxe v. State College Area School District*, __ F.3d __ (3d Cir. 2001; decided 2/14/01; cited in 2/15/01 *Legal Intelligencer*, pp. 1, 7). The Third Circuit, further, has held that a public employee enjoys First Amendment protection even when his speech causes a "disruption" in the office, and public employers cannot silence such an employee (by firing) simply because they disapprove of the content of their speech. *Baldassare v. State of New Jersey*, __ F.3d __ (3d Cir. 2001; decided 5/01 and cited in 5/3/01 *Legal Intelligencer*, pp. 1, 25). Baldassare clearly was not a Nigerian immigrant, black in race, like Dr. Osuala, or his speech would not have been protected as one of the same jurists deciding his appeal was on the panel deciding Dr. Osuala's. There is "no question" here that the courts below ignored the law and the actual evidence, to deny Dr. Osuala Equal Protection of the Law. This Supreme Court cannot condone same.

II. THE QUESTIONS PRESENTED ARE IMPORTANT

That there is a great need here for this Honorable Supreme Court to exercise its supervisory power under Supreme Court Rule 10(a), to Reverse the courts below and Order them to follow *Reeves* and submit this matter to a jury is an understatement. The courts below are bound by the Constitution to enforce the law of the land, and may not shirk this duty because of their own improper motives or because of their connections to/affinity for the defense firm. They may not threaten an African-American lawyer who happens to discover that they exercised their discretion favorably for white Civil Rights plaintiffs but then refused to do so for black Civil Rights plaintiffs just months later. A district court judge cannot be allowed to, whether he has

jurisdiction or not, threaten to slap a black lawyer with an adverse ruling on opposing counsel's Motion for fees and costs, because the judge doesn't like the fact that the lawyer is being a zealous advocate. And no Court of Appeals panel or court en banc can be allowed to sweep such under the rug via a Memorandum Opinion which, itself, ignores the law, the evidence, and stare decisis from this Honorable Supreme Court. This is 21st Century America, not 20th Century Marxist Russia or Maoist China or Fascist Italy or Nazi Germany. Petitioner made out her prima facie case below, and this matter should be Reversed with Orders that it proceed for disposition by a jury forthwith.

III. THE COURT OF APPEALS DECISION IS HARSHLY DEBILITATING UPON AFRICAN-IMMIGRANTS' ADVOCACY OF THEIR TITLE VII/STATUTORY/CONSTITUTIONAL RIGHTS IN 21ST CENTURY AMERICA AND THE AMERICAN ACADEMIC COMMUNITY

Petitioner's Argument here is subsumed in the preceding Sections I and II, which are incorporated herein by reference as if same were more fully set forth herein at length.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MAY 23, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2463

KATE OSUALA, DR.

Appellant

v.

COMMUNITY COLLEGE OF PHILADELPHIA

On Appeal From The United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil No. 00-cv-00098)
District Judge: Honorable John R. Padova

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 15, 2001

BEFORE: SCIRICA, GARTH and STAPLETON,
Circuit Judges

(Opinion filed MAY 23 2001)

MEMORANDUM OPINION OF THE COURT

Appendix A

STAPLETON, *Circuit Judge*:

Dr. Kate Osuala ("Osuala") appeals from the District Court's grant of Community College of Philadelphia's ("CCP") motion for summary judgment.[1] Inasmuch as we write only for the parties, we need not rehearse the facts of this case in any detail. Suffice it to say that Osuala's tenure at CCP was tumultuous. Her employ began on April 1, 1994, and CCP received the first complaint about her work conduct on May 10, 1994, a mere five and one-half weeks later. As revealed through extensive documentary and testimonial evidence, Osuala's behavioral misconduct continued unabated until February 12, 1998, when CCP suspended Osuala without pay for the remainder of the 1997-98 academic year. During the time Osuala was employed by CCP, it attempted to address its concerns with her, either verbally or in writing, some eleven times.

Osuala's primary contention on appeal is that the District Court erred when it concluded that she failed to establish a prima facie case of racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1). Because this case comes to us on appeal from the grant of summary judgment, our review is plenary.[2]

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1. The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 2000e-5(f)(3). This court has jurisdiction pursuant to 28 U.S.C. § 1291.

2. We review of the District Court's denial of Osuala's motion to amend her complaint and of its discovery rulings, however, for abuse of discretion. *See United States v. Duffus*, 174 F.3d 333, 336 (3d Cir. 1999); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 916 (3d Cir. 1990).

Appendix A

We review the facts in the light most favorable to the party against whom summary judgment was entered. *See Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 146 (3d Cir. 1993). Summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *See* F.R.C.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To survive summary judgment, "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Under Title VII, there are two primary ways in which a plaintiff can establish a claim of racial discrimination in an adverse employment action. A plaintiff may sustain her claim by presenting direct evidence of racial discrimination. *See Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1095 n.4 (3d Cir. 1995). Osuala does not seek recovery pursuant to this theory. Alternatively, a plaintiff may establish racial discrimination indirectly via the burden shifting paradigm of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Here, the plaintiff bears the initial burden of producing evidence sufficient to convince a reasonable factfinder to find all of the elements of a prima facie case.

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was

> seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.[3] We recently interpreted this passage to require a plaintiff in a racial discrimination case to show, more generally, that (1) she is a member of a protected class; (2) she was qualified for the position; and (3) she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 357 (3d Cir. 1999).[4] If the plaintiff produces the required evidence, then the burden of production (but not persuasion) shifts to the defendant to offer a legitimate, nondiscriminatory explanation for the job action. *See Keller v. ORIX Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3d Cir. 1997). If the defendant cannot meet this challenge, then judgment must be entered for the plaintiff. *Id.* If, however, the defendant does meet this challenge, the plaintiff, to escape

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3. Osuala misstates the law when she asserts that, in certain instances, "it is not always necessary for a plaintiff to make out the 4th prong of her/his prima facie case . . . ." None of the cases Osuala cites supports this assertion; rather, as we discuss below, there are several, equally acceptable ways in which a plaintiff may (and must) establish the fourth prong.

4. Our holding in *Pivirotto* was in response to the Supreme Court's guidance that "the facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas*, 411 U.S. at 802 n.13.

summary judgment, must come forward with evidence that, together with plaintiff's prima facie case, would allow a reasonable trier of fact to render judgment in her favor. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994) (discussing the ways in which a plaintiff can meet this challenge).

For purposes of adjudicating this dispute, we focus on the portion of the prima facie case requiring Osuala to produce evidence that it was more likely than not that she was fired under circumstances giving rise to an inference of unlawful discrimination.[5] As we indicated in *Pivirotto*, there are three general ways for a plaintiff to meet this burden. First, she can show that she was replaced by a member of a nonprotected class. Osuala attempts to do so by alleging that she was replaced by a white librarian; if this were true, she would meet her burden. However, Osuala produces no evidence or citations to the record to substantiate her claim. CCP, however, points to the only evidence of record, namely, its answer to Osuala's demand for admission that Osuala was replaced by a white librarian. To the contrary, CCP states that Osuala's duties were assumed by an African-American woman. As there is not even a scintilla of evidence that Osuala was replaced by a nonprotected class member, we find no basis here upon which to conclude that Osuala's termination occurred in a manner giving rise to an inference of discrimination.

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5. The parties agree that Osuala is a member of a racial minority, that she was qualified for the job, and that she was discharged.

Second, a showing that similarly situated nonprotected class members received more favorable treatment than did she would give rise to an inference of unlawful discrimination. *See Pivirotto*, 191 F.3d at 357. Osuala attempts to do just this, alleging that " 'rude, obnoxious and insubordinate behavior' of white faculty of appellee is regularly and historically tolerated by appellee and the tenure of such white faculty is not prematurely terminated due to such behavior. . . ." The evidence, however, does not support Osuala's contention. Joan Johnson, the Executive Director of CCP's library, testified that although she had received complaints about other library staff,

> I have never, in my experience in the library, had the level or degree of student complaints I have had about Dr. Osuala. I have spoken to other library staff about incidents that have been reported to me and generally that has been sufficient.
>
> We have never, ever had the degree of complaints that we have had about Dr. Osuala.

These comments were echoed by Dr. Ronald Williams, at various times CCP's Vice President and Acting President:

> Q. First of all, you were asked about rudeness of other librarians.
>
> Did the number of complaints of unprofessional, insubordinate conduct against Dr. Osuala that came to your attention, did you ever receive at

the community college those number of complaints regarding any other librarian?

A. No, I didn't.

We agree with the District Court that "because no other librarian's conduct approached that of Dr. Osuala, Defendant's failure to discipline other librarians does not create an inference of discrimination." *See Pivirotto*, 191 F.3d at 359-60 (analyzing and rejecting an allegation of disparate treatment of similarly situated men and women).

Third, this court has recently made clear that a plaintiff's burden is only to produce evidence from which a reasonable trier of fact could infer discriminatory animus; we did not require that this burden be met in any particular way. *See id.* at 357. Accordingly, although Osuala has failed to establish either that she was replaced by a nonprotected class member or that similarly situated nonprotected class members were treated more favorably than was she, she could still meet her burden to establish a prima facie case of racial discrimination if she could produce some other evidence from which a reasonable trier of fact could infer that she suffered from unlawful discrimination. *See id.* at 357-60. Osuala's only other putative evidence of racial animus is her assertion that her termination was in response to and in retaliation for her December 2, 1996, complaint to CCP that she was herself the victim of discrimination.[6] Evidence of retaliation, even

6. In her Complaint, Osuala alleges that she was discriminated against on the basis of race and also retaliated against "for raising issues of national origin/race discrimination . . . ." Except for one paragraph of her brief on appeal, Osuala does not discuss her (Cont'd)

if substantiated, would not in and of itself satisfy Osuala's burden. Without more, there is no connection between a dismissal in response to a complaint and racial animus. Even if a showing of retaliation could somehow support a claim of racial discrimination, Osuala has failed to establish that her termination was related to her complaint. Complaints about Osuala's conduct began less than two months after she started working for CCP and continued unabated throughout her employment there. Similarly, CCP's efforts to address Osuala's conduct began shortly after it received the first complaint and continued throughout her employment there. Because CCP consistently received complaints about Osuala's conduct and consistently attempted to address the problem both before and after Osuala filed her grievance in December of 1996, we conclude that no reasonable trier of fact could find a causal connection between Osuala's grievance and CCP's ultimate decision to fire her. As such, the fact that Osuala filed a grievance cannot support a reasonable inference that CCP was motivated by racial animus when it fired Osuala.[7]

(Cont'd)
retaliation claim. Assuming that this one paragraph is sufficient to maintain the retaliation claim on appeal, our comments apply with equal force against that claim, too.

7. Because Osuala did not attach a copy of her proposed Amended Complaint to her Motion to Amend and filed the motion one month after the close of discovery and less than one month before the case was likely to go to trial, the District Court did not abuse its discretion in denying the motion. Likewise, the District Court did not abuse its discretion in limiting Osuala's access to only the relevant W-2s she sought. Having carefully considered Osuala's other arguments, we conclude that none have merit.

Appendix A

Because Osuala has failed to establish a prima facie case of racial discrimination, she cannot recover on her Title VII claim. Accordingly, we will affirm the judgment of the District Court.

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

s/ Walter K. Stapleton
Circuit Judge

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED AUGUST 15, 2000 AND PETITIONER'S F.R.A.P. 10 STATEMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 00-98

DR. KATE OSUALA,

Plaintiff,

vs.

COMMUNITY COLLEGE OF PHILADELPHIA,

Defendant.

MEMORANDUM

Padova, J.

Plaintiff, Dr. Kate Osuala, brings this action for racial discrimination and retaliation under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C.A. §§ 2000e – 2000e-17. Plaintiff alleges that she was terminated from her position with Defendant Community College of Philadelphia as a result of racial and national origin discrimination and in retaliation for raising complaints of discrimination. Before the Court is Defendant's Motion for Summary Judgment. For the reasons that follow, the Court will grant Defendant's Motion.

Appendix B

I. *BACKGROUND*[1]

Dr. Kate Osuala is an African American woman born in Nigeria. She commenced work for Defendant as General Services Librarian on April 1, 1994. (Pl. Mem. at 4.) She worked for Defendant in this capacity until she was terminated in February 1998. (*Id.* at 6.)

Throughout her term of employment, Plaintiff's professional competence as a librarian was never at issue. Rather, beginning shortly after she began work, problems developed in Plaintiff's relationship with library personnel. Plaintiff asserts that these problems stemmed from Defendant's discriminatory focus on Plaintiff's culture and national origin. (Pl. Mem. at 1-2.) Defendant insists that conflicts resulted from Plaintiff's unprofessional, rude, and insubordinate behavior. (Def. Mem. at 2.) Executive Director of Library Services Joan Johnson ("Ms. Johnson") and Plaintiff's immediate supervisor Jerry Fedorijczuk ("Mr. Fedorijczuk") met with Plaintiff on several occasions and sent several memoranda to her between 1994 and October 1996 (*Id.* at 6-7), but the relationship between Plaintiff and her supervisors continued to deteriorate.

On or before October 1996, Plaintiff sent a memorandum to her Union representative, Rick Bojar, complaining of discriminatory treatment. (Pl. Ex. 6, Fedorijczuk Test. at

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1. The following summary is based on the evidence of record viewed in the light most favorable to Plaintiff, the nonmoving party, as required when considering a motion for summary judgment. *Carnegie Mellon Univ. v. Schwartz*, 105 F.3d 863, 865 (3d Cir. 1997).

953.) On November 19, 1996, Ms. Johnson issued a formal written warning to Plaintiff, threatening disciplinary action should Plaintiff engage in further unprofessional conduct. (Def. Ex. E at 24, Johnson Mem.) On December 2, 1996, Plaintiff filed a grievance with her Union, alleging race and national origin discrimination. (Def. Ex. E at 32-33, Osuala Grievance.)

Plaintiff contends that further discriminatory treatment followed, in retaliation for filing this grievance. (Pl. Mem. at 6.) According to Defendant, Plaintiff's conduct remained unprofessional and inappropriate. (Def. Mem. at 8.) Finally, in March 1997, Ms. Johnson recommended non-renewal of Plaintiff's appointment to Defendant. (Def. Ex. E at 53, Johnson Mem.) Accepting this recommendation, Defendant President Frederick W. Capshaw, Ph.D. gave Plaintiff a terminal appointment for the 1997-1998 academic year. (*Id.* at 55, Capshaw Letter to Pl.) In September 1997, Defendant Vice President for Academic Affairs Ronald A. Williams, Ph.D. notified Plaintiff that she would not be reappointed for the 1998-1999 academic year. (*Id.* at 105, Williams Letter to Pl.) Dr. Williams suspended Plaintiff effective February 12, 1998, for the remainder of the academic year, and she has not worked for Defendant since that date. (*Id.* at 227, Williams Letter to Pl.)

Arbitration hearings were held on Plaintiff's grievances pursuant to the Collective Bargaining Agreement ("CBA") between Plaintiff's Union and Defendant. These proceedings took place over twelve days between June 1998 and March 1999. (Def. Ex. A, Arbitration Op. at 1.) Arbitrator Walter J. Gershenfeld issued his opinion on September 7, 1999. (*Id.*)

The opinion found no discriminatory action by Defendant, and that Plaintiff's dismissal was for just cause. (*Id.* at 29-30.) However, the Arbitrator awarded $1,000 to Dr. Osuala for Defendant's procedural errors in the March 1997 notice of non-renewal. (*Id.* at 30.)

Plaintiff filed the instant Complaint on January 7, 2000. Defendant moved for summary judgment on June 13, 2000. The matter is now fully briefed and ready for decision.

II. *LEGAL STANDARD*

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" only if there is sufficient evidence with which a reasonable jury could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Furthermore, bearing in mind that all uncertainties are to be resolved in favor of the non-moving party, a factual dispute is only "material" if it might affect the outcome of the case. *Id.* A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial *Celotex* burden can be met simply by "pointing out to the district court that there is an absence of

evidence to support the non-moving party's case." *Id.* at 325. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

III. *DISCUSSION*

Defendant moves for summary judgment on four grounds: (1) that Plaintiff's claims are waived under the terms of her Union's CBA; (2) that Plaintiff's claims are barred by the doctrine of issue preclusion; (3) that Plaintiff cannot make out a prima facie case of discrimination or retaliation; and (4) that even assuming a prima facie case, Plaintiff cannot show that Defendant's proffered non-discriminatory reasons for adverse employment decisions were pretextual. The Court will examine each basis for Defendant's Motion in turn.

A. *Waiver*

The CBA between Plaintiff's Union and Defendant contains both an anti-discrimination clause and a grievance procedure. The grievance procedure provides for binding arbitration to settle all complaints alleging violation of the CBA, including discrimination complaints. Defendant argues that Plaintiff has waived her right to a judicial forum under the CBA's arbitration and antidiscrimination clauses. (Def. Mem. at 14.) For the reasons that follow, however, the Court concludes that the instant CBA does not serve as a clear and unmistakable waiver of Plaintiff's right to bring a statutory discrimination claim in federal court.

Appendix B

In 1974, the Supreme Court held that "there can be no prospective waiver of an employee's rights under Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). Revisiting the issue in 1991 in light of trends favoring the use of arbitration to resolve disputes, the Court found that a statutory claim could be the subject of an enforceable binding arbitration agreement. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). *Gilmer*, however, involved an individually executed agreement, not a waiver pursuant to a union-negotiated CBA. *Id.*

In 1998, the Court addressed whether a CBA arbitration clause could waive an employee's right to a judicial forum in an employment discrimination claim. *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). The *Wright* Court found that while a general arbitration clause in a CBA could not waive a statutory discrimination claim, a specific, "clear and unmistakable" waiver might be enforceable. *Id.* at 79-81. However, because the waiver in *Wright* did not meet this exacting standard, the Court declined to reach the question of whether an appropriate waiver would indeed be enforceable. *Id.* at 82.[2]

In the aftermath of *Wright*, a New York district court found a CBA waiver of a statutory right "clear and

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2. In finding the *Wright* CBA too general to waive statutory rights, the Supreme Court noted that it contained "no explicit incorporation of statutory antidiscrimination requirements." *Id.* at 80. The arbitration clause in *Wright* generally provided for arbitration of "[m]atters under dispute," but the remainder of the CBA contained no specific antidiscrimination provision. *Id.* Thus, the Supreme Court did not quantify the amount of statutory language a CBA must contain to qualify as a "clear and unmistakable" waiver.

unmistakable," and therefore, enforceable. *Clarke v. UFI, Inc.*, 98 F. Supp. 2d 320 (E.D.N.Y. 2000). The *Clarke* Court reached this conclusion regarding claims of sexual harassment and retaliation because the CBA contained both a specific clause prohibiting sexual harassment and a grievance procedure that prescribed binding arbitration to settle claims under the sexual harassment clause. *Id.* at 332. On the other hand, a court in this district, albeit in a decision issued several months before *Wright*, expressed doubts that Congress intended to permit a CBA to waive an individual employee's rights to select a federal judicial forum under Title VII. *Equal Employment Opportunity Commission v. Pathmark Inc.*, No. Civ. A. 97-3994, 1998 WL 57520, at *4 (E.D. Pa. Feb. 12, 1998). The only United States Court of Appeals for the Third Circuit ("Third Circuit") opinion to address this issue found a CBA enforceable to waive statutory discrimination claims where "the language of the collective bargaining agreement . . . explicitly provide[d] for the mandatory arbitration of statutory discrimination claims." *Martin v. Dana Corporation*, 114 F.3d 421, 1997 WL 313054, at *9 (3d Cir. June 12, 1997), *withdrawn*, 114 F.3d 421 (1997), *vacated*, 114 F.3d 428 (1997), *rev'd*, 135 F.3d 765 (1997).[3]

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3. The *Martin* CBA provided:

> Any and all claims regarding equal employment opportunity provided for under this Agreement or under any federal, state or local fair employment practice law shall be exclusively addressed by an individual employee of the Union under the grievance and arbitration provisions of this Agreement.

Id.

The divided *Martin* opinion, however, was subsequently vacated by the Third Circuit. *Martin v. Dana Corporation*, 135 F.3d 765 (3d Cir. 1997). Therefore, it has no precedential value. The majority view among the Circuit courts remains that mandatory arbitration clauses in CBAs are unenforceable for statutory discrimination claims. *See* Jacob E. Tyler, *Mandatory Arbitration of Discrimination Claims Under Collective Bargaining Agreements: The Effect of Wright*, 4 Harv. Negotiation L. Rev. 253, n.69 (1999) (discussing the split among Circuit courts on this issue).

Defendant argues that the instant CBA contains a specific anti-discrimination clause, as well as a grievance and binding arbitration provision. Because any complaint alleging violation of the CBA comes under the grievance procedure, which includes binding arbitration, Defendant contends that all discrimination claims, including statutory claims, are explicitly subject to binding arbitration. Relying heavily on *Clarke*, Defendant thus concludes that the instant CBA meets the *Wright* Court's requirements for a "clear and unmistakable" waiver of the right to a judicial forum, and therefore should be enforced. The Court does not agree.

The anti-discrimination clause in the instant case, Article IV(A) of the CBA, states that:

> Neither the Board nor the Federation shall discriminate against any Employee because of race, creed, color, national origin, sex, age, marital status, sexual orientation or membership in (or lack thereof) or activities on behalf of the Federation or any other organization or for any other reason violative of law.

Appendix B

(Def. Ex. K at 7.) The grievance procedure, Article XXII, declares that:

> A grievance is an allegation or complaint that there has been a breach, violation . . . or a deviation from, the terms of this Agreement or of any policy, practice, or procedure which relates to wages, hours, or working conditions.

(Def. Ex. K at 84.) The grievance procedure further provides that if the parties cannot resolve a grievance they may "submit the matter . . . for binding arbitration," and "the decision of the arbitrator shall be final and binding upon the parties . . ." (*Id.* at 86). Thus, in order to conclude that all discrimination claims are subject to binding arbitration, these clauses must be read together. This was the approach taken by the *Clarke* Court, which this Court understands to have determined that a CBA which recites discrimination claims and also contains a grievance procedure prescribing binding arbitration for such claims sufficiently meets the clear and unmistakable standard of *Wright*. This Court departs from the *Clarke* rationale. Rather, this Court concludes that in order to constitute a clear and unmistakable waiver, a CBA must explicitly cover federal statutory claims and must contain clear and unmistakable waiver language. The instant CBA falls far short of these requirements. There is no clause in the instant CBA comparable to that in *Martin* explicitly providing that all statutory claims shall be exclusively addressed through binding arbitration. Nor does this CBA contain a provision explicitly stating that the employee agrees to arbitrate all statutory discrimination claims, and waives any later right to a judicial forum. Any waiver of statutory

rights here is at best implicit, rather than explicit. Thus, even if the law would allow a "clear and unmistakable" CBA waiver of statutory discrimination claims to be enforced, the Court concludes that this waiver does not meet the *Wright* standard. Therefore the Court will not grant summary judgment based on this threshold issue.

B. *Issue Preclusion*

Defendant next contends that Plaintiff's claims are precluded from relitigation because the issues were already decided in the previous arbitration.

Issue preclusion, also known as collateral estoppel, prevents parties from relitigating issues that have been adjudicated previously on their merits. *Witkowski v. Welch*, 173 F.3d 192, 198 (3d Cir. 1999). The requirements for applying the doctrine of issue preclusion are: (1) that the issue previously decided is identical with the one later presented; (2) that there was a final judgment on the merits; (3) that the party against whom issue preclusion is asserted was a party or was in privity with the party to the prior adjudication; and (4) that the party against whom issue preclusion is asserted had a full and fair opportunity to litigate the issue in question in the prior adjudication. *Id.* at 199. However, the "application of collateral estoppel from arbitral findings is a matter within the broad discretion of the district court." *Giles v. City of New York*, 41 F. Supp. 2d 308, 313 (S.D.N.Y. 1999) (quoting *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir. 1991)). Thus, "[i]ssue preclusion based on a prior arbitration is permissible, but not mandatory." *Id.*

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The arbitrator in the instant case addressed a charge of discrimination, but this charge was not clearly delineated as a statutory claim under Title VII. (Def. Ex. A. at 2.) Moreover, the arbitration did not specifically address a retaliation claim. (*Id.*) Thus, the claims Plaintiff presents to this forum are not clearly identical with those addressed in the arbitration proceeding. Under these circumstances, the Court declines to exercise its discretion to apply the doctrine of issue preclusion to Plaintiff's claims.

C. *Prima Facie Case*

In the absence of direct evidence of discrimination, the burden shifting paradigm of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) applies to a Title VII case. The United States Court of Appeals for the Third Circuit ("Third Circuit") interpreted the *McDonnell Douglas* approach in the context of summary judgment motions in *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994).

Fuentes dictates that the plaintiff bears the initial burden of establishing a prima facie case of employment discrimination. *Fuentes*, 32 F.3d at 763. If the plaintiff makes a prima facie showing, the burden of production then shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employer's rejection." *Id.* (citation omitted). The defendant satisfies this burden "by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision." *Id.* If the defendant carries this relatively light burden by articulating a legitimate reason, however, "the burden of production rebounds to the

plaintiff, who must now show, by a preponderance of the evidence, that the employer's explanation is pretextual." *Id.*

(i) Racial and National Origin Discrimination

In *McDonnell Douglas*, a failure-to-hire case, the Supreme Court outlined a four-prong test a plaintiff must meet to establish a prima facie case of discrimination: (i) that she was a member of a protected class; (ii) that she was otherwise qualified for the position; (iii) that, despite her qualifications, she was rejected; and (iv) that, after her rejection, the position remained open and the employer continued to seek applicants of the plaintiff's qualifications. *McDonnell Douglas*, 411 U.S. at 802. In a case of discriminatory discharge, the Third Circuit interpreted the fourth prong to require the plaintiff to show that she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 357 (3d Cir. 1999). While common circumstances giving rise to an inference of unlawful discrimination include the more favorable treatment of similarly situated colleagues outside of the relevant class or the replacement of a plaintiff by someone outside her protected class, the *Pivirotto* Court explicitly stated that a plaintiff can make out a prima facie case even without demonstrating such circumstances. *Id.* Nevertheless, the plaintiff still "must prove by a preponderance of the evidence that a prima facie case of discrimination exists. It does not suffice to suggest the mere possibility of discrimination." *Bullock v. Children's Hospital of Philadelphia*, 71 F. Supp. 2d 482, 490 (E.D. Pa. 1999).

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In the instant case, the parties agree that Plaintiff meets the first three prongs of the prima facie test. She is a Nigerian born African American woman who was qualified for the job from which she was terminated by Defendant. The parties disagree about the fourth prong. Because Plaintiff fails to present evidence that she was terminated under circumstances giving rise to an inference of discrimination, the Court finds that she fails to establish a prima facie case.[4]

Plaintiff charges that Executive Director of Library Services Joan Johnson took the "unusual action . . . before Plaintiff even set foot upon defendant's campus" of directing "the Library personnel to focus upon Plaintiff's different national origin vis a vie [sic] theirs." (Pl. Mem. at 9.) She accuses Ms. Johnson of acting "with such animus to adversely effect the terms and conditions of Plaintiff's employment." (*Id.*) Had Plaintiff substantiated these charges, a prima facie case clearly would be established. However, in support of her contention, Plaintiff submits the following memorandum from Ms. Johnson to the library personnel:

> I am happy to tell you that the position of General Services Librarian has been filled. Dr. Kate Osuala has accepted the job and will be starting here at the beginning of April. She will be taking over Jerry Fedorijczuk's former position

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4. The Court notes that both parties misstate the applicable fourth prong. Defendant incorrectly argues that Plaintiff must show that "other employees not in the protected class were treated more favorably." (Def. Mem. at 25.) Plaintiff erroneously concludes that the fourth prong "does not have to be present to make out a prima facie case." (Pl. Mem. at 9.)

> supervising work-study students and overseeing the Reserve and Periodical areas, as well as working at the Reference Desk. Jerry will continue to oversee interlibrary Loan.
>
> Dr. Osuala is from Nigeria and comes to us from a position at the Free Library of Philadelphia.

(Pl. Ex. 1.) The mere mention of Dr. Osuala's birthplace provides no evidence that Ms. Johnson was focusing on Plaintiff's national origin with discriminatory "animus." Thus, the Court can draw from this memorandum no inference of unlawful discrimination.

Plaintiff further alleges discriminatory conduct on the part of Executive Director Johnson, Acting College President Ronald Williams, and Plaintiff's immediate supervisor Jerry Fedorijczuk. An overall review of the arbitration hearing and deposition testimony provided by Plaintiff fails to support these allegations.[5]

Plaintiff asserts that Ms. Johnson "**admitted**" [Plaintiff's emphasis] that she took no disciplinary action against white and non-African immigrant library employees for "the same

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5. The Court notes that Plaintiff provides no specific citations in support of her charges. Rather, she supports her specific charges of discriminatory conduct with global citations to approximately 80 pages of Ms. Johnson's testimony at the arbitration hearings, approximately 50 pages of Dr. Williams' deposition testimony, and approximately 75 pages of Mr. Fedorijczuk's arbitration hearing testimony.

type of allegedly rude and confrontational behavior for which she disciplined Plaintiff and for which she recommended the firing of Plaintiff." (Pl. Mem. at 10.) Plaintiff further asserts that Ms. Johnson admitted "that no other Librarian was disciplined for what turned out to be anonymous/fictitious student complaints except for Plaintiff." (Pl. Mem. at 11.) In contrast with these assertions, nowhere in Ms. Johnson's testimony does she state that "fictitious" student complaints were actually used to buttress the case for termination of Plaintiff. Moreover, rather than indicating that non-African librarians were not disciplined for the same conduct exhibited by Plaintiff, Ms. Johnson states, "I have never, in my experience in the library, had the level or degree of student complaints I have had about Dr. Osuala." (Pl. Ex. 4, Johnson Test. at 507-08.) She acknowledges receiving occasional complaints about other librarians, but clearly emphasizes that complaints about Dr. Osuala were far greater in number and significance than those about any other librarian. Thus, because no other librarian's conduct approached that of Dr. Osuala, Defendant's failure to discipline other librarians does not create an inference of discrimination. *See St. Hilaire v. The Pep Boys — Manny, Moe and Jack*, 73 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999) (stating that in determining whether similarly situated employees are more favorably treated, "the quantity and quality of the comparator's misconduct [must] be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges"). Other allegations about the failure of Ms. Johnson to similarly discipline the library "classified staff" are inapposite. These employees were Plaintiff's subordinates, and therefore not similarly situated to Dr. Osuala.

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Plaintiff similarly makes sweeping conclusions about Dr. Williams' testimony, without providing a specific supporting citation: "Dr. Williams ***admits*** he had evidence of other Librarians at defendant engaging in the same behavior for which Plaintiff was fired yet who were not disciplined. . ." (Pl. Mem. at 11.) Dr. Williams, like Ms. Johnson, acknowledged that there were complaints about other librarians. (Pl. Ex. 5, Williams Depo. at 63-68.) Nowhere in his deposition, however, does he say that these librarians were engaging in the same behavior for which Plaintiff was fired. Instead, Dr. Williams testified that he never received a similar number of complaints of unprofessional, insubordinate conduct about any other librarian. (Def. Reply, Ex. A, Williams Depo. at 74-75.) Rather than resulting merely from isolated complaints of rude behavior, Dr. Williams described Dr. Osuala's firing as stemming from her refusal to take direction from her supervisors, which resulted in a "state of anarchy" in the library. (*Id.* at 22.) Plaintiff apparently contends that all complaints of "rude behavior" mandate the same discipline by employers regardless of the specific nature of the behavior and the number of occurrences in order to avoid an inference of discrimination. The Court cannot subscribe to this conclusion. Under these circumstances, Plaintiff's charges of discrimination amount to no more than mere speculation. *See Bullock*, 71 F. Supp. 2d at 490 (discussing the difference between speculation and inference, and concluding that "a prima facie case of discrimination requires more than . . . speculation").

In support of her claim of discriminatory treatment, Plaintiff quotes Mr. Fedorijczuk as asking her "when are

you going back to Nigeria?" (Pl. Mem. at 13.) In his deposition, however, Mr. Fedorijczuk explained,

> I . . . did not constantly ask her if she's going back to Africa. I did on one occasion ask her during early summer if she was planning a trip back to Nigeria because she had gone the summer before, strictly just conversational things.

(Def. Ex. C, Fedorijczuk Depo. at 724.) When he learned that she took offense to the comment, he apologized. (*Id.* at 725.) Thus, Plaintiff has not shown that this comment was motivated by discriminatory animus. Moreover, Mr. Fedorijczuk's deposition shows that the comment was made sometime prior to August 1996, at least seven months before Plaintiff received notice of non-renewal. (*Id.* at 724.) Regardless of the speaker's intent, this exchange took place too long before Plaintiff's termination to by itself establish discharge under circumstances giving rise to an inference of discrimination. *See Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992) (concluding that "[s]tray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight, particularly if they were made temporally remote from the date of decision").

Finally, Plaintiff's assertion that her position "is now split between 2-3 employees not within her protected class," if substantiated, could establish the fourth prong of the prima facie test. (Pl. Mem. at 4, 16.) Plaintiff, however, provides as her only documentation for this claim, a collection of approximately fifty W-2 forms of library personnel.

(Pl. Ex. 19.) These forms do not establish that Plaintiff was replaced by individuals outside her protected class. In its Response to Plaintiff's Request for Admission No. 6, Defendant asserts that an African American woman now performs Plaintiff's duties. (Def. Ex. M.) Thus, Plaintiff's bare assertion is insufficient to create an inference of discrimination.

The Court has carefully reviewed all Plaintiff's claims that could possibly support the fourth prong of the prima facie test, and concludes that she has not met her burden. However, the Court will continue its inquiry and examine whether Plaintiff has provided evidence to show that Defendant's proffered legitimate reasons for its actions are pretextual. Before doing so, the Court will analyze whether Plaintiff has established a prima facie case of retaliation.

(ii) Retaliation

To establish a prima facie case of retaliation, Plaintiff must show that: (1) she was engaged in a protected activity; (2) the employer took an adverse employment action against Plaintiff after or contemporaneous with her engagement in that protected activity; and (3) a causal link existed between the protected activity and the adverse employment actions. *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 501 (3d Cir. 1991) (citing *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989)). Thus, while timing alone may be sufficient in unusual factual situations, "the mere fact that adverse employment action occurs after a complaint will ordinarily be insufficient to satisfy the plaintiff's burden of demonstrating a causal link between the two events." *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1301 (3d Cir. 1997).

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Defendant argues that Plaintiff has not established a prima facie case of retaliation. Plaintiff counters by alleging that she received her first formal warning about her conduct in November 1996, one month after she complained about discriminatory treatment. (Pl. Mem. at 10.)[6] Plaintiff provides nothing further to establish a causal link between her complaint and adverse employment action. To the contrary, the record shows that there had been numerous discussions with Plaintiff about inappropriate behavior in the two years before she first complained of discrimination. (Def. Mem. at 6-7.) While she made an informal complaint prior to the warning, she only filed a formal grievance alleging discrimination one month after the warning, in December 1996. (Def. Ex. E at 32-33, Osuala Grievance.) She was notified of non-renewal in March 1997, and was suspended from employment in February 1998. The Court finds that in this context of ongoing problems long before her first complaint, and the length of time between the complaint and her ultimate termination, the facts do not support a prima facie case of retaliation based on timing alone.

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6. The Court notes that Plaintiff provides no specific citation for this allegation, referring instead to this "admission" as "buried in Johnson's Arbitration testimony." (Pl. Mem. at 10.) In the testimony provided, Ms. Johnson acknowledges that she issued the first written warning in November 1996. (Pl. Ex. 4, Johnson Test. at 534.) However, her testimony is unclear about when the warning was issued in relation to Plaintiff's written complaint of discrimination. (*Id.* at 543.) Mr. Fedorijczuk (who did not issue the warning) indicated that he "may have" received a copy of Plaintiff's memorandum to the Union representative claiming discrimination in October 1996. (Pl. Ex. 6, Fedorijczuk Test. at 953.)

Finally, Plaintiff offers the putative "nearly 70% drop" in her salary after she complained of discrimination as evidence of retaliation. (Pl. Mem. at 3.) However, as Defendant points out, the reduction in Plaintiff's 1998 annual earnings actually occurred because she was terminated from employment after working for only two months in 1998. (Def. Reply at 3.) Dr. Williams' letter suspending Plaintiff documents that she received her salary through March 31, 1998. (*Id.*, Ex. B.) Thus, Plaintiff's 1998 earnings were reduced compared with 1997 because of her termination, not because of any reduction in salary. There simply is no support in the record for Plaintiff's contention that her salary was decreased after she complained of discrimination.

Although Plaintiff has not made out a prima facie case for discrimination or retaliation, the Court will nevertheless proceed to consider whether Plaintiff can show that Defendant's reasons for its adverse employment actions were pretextual.

D. *Pretext*

Under the burden-shifting paradigm of *McDonnell Douglas* as explicated by *Fuentes*, the burden now shifts to Defendant to articulate a "legitimate, nondiscriminatory reason" for Plaintiff's termination. *Fuentes*, 32 F.3d at 763. Should Defendant carry this "relatively light burden," Plaintiff must then show, by a preponderance of the evidence, that Defendant's explanation is pretextual. *Id.*

Defendant argues that Plaintiff was discharged for "continued rude, abrasive and inappropriate behavior and

her insubordination toward her supervisors." (Def. Mem. at 32.) Defendant contends it was forced to terminate Plaintiff because her "unprofessional and insubordinate behavior substantially harmed the functioning of the Library at the College." (Def. Mem. at 38.) In light of the documentation provided by Defendant in support of its reasons, the Court concludes that Defendant has satisfied its burden of articulating legitimate, non-discriminatory reasons for terminating Plaintiff.

In order to survive a motion for summary judgment by showing that Defendant's explanation is pretextual,

> [T]he plaintiff generally must submit evidence which: (1) casts sufficient doubt upon each of the legitimate reasons proffered by the defendant so that a factfinder could reasonably conclude that each reason was a fabrication; or (2) allows the factfinder to infer that discrimination was more likely than not a motivating or determinative cause of the adverse employment action.

Fuentes, 32 F.3d at 762.

The *Fuentes* Court also addressed the nature and quantum of evidence that Plaintiff must adduce on the issue of pretext.

> [T]he plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that

> an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action . . . [A] plaintiff who has made out a prima facie case may defeat a motion for summary judgment by either (i) discrediting the proffered reasons, either circumstantially or directly, or (ii) adducing evidence, whether circumstantial or direct, that discrimination was more likely than not a motivating or determinative cause of the adverse employment action . . . [T]he non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for [the asserted] non-discriminatory reasons.

Id. at 764-765 (internal quotations and citations omitted). Furthermore, "[t]o discredit the employer's proffered reason, the plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id.* at 765. .

The Court finds that Plaintiff has not come forward with competent evidence, as defined in *Fuentes*, to demonstrate that a genuine issue of fact exists as to pretext. While Plaintiff's Memorandum is rampant with assertions that the

actions of Ms. Johnson, Dr. Williams, and Mr. Fedorijczuk were motivated by racism and retaliation, the record provides no support for these assertions. As described previously (*see supra* Part III.C), Plaintiff provides no specific record citations to support her charges, and the Court's overall review of the depositions provided results in the conclusion that the charges are unfounded. Bare assertions of discriminatory motives do not meet the *Fuentes* standard. Moreover, Plaintiff has utterly failed to demonstrate any weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Defendant's proffered legitimate reasons for its conduct with respect to Plaintiff's termination.

Because Plaintiff has failed to submit any evidence which tends to negate or cast doubt on Defendant's proffered legitimate non-discriminatory reasons for its action, she has failed to meet her *Fuentes* burden of persuasion. Accordingly, the Court will grant Defendant's Motion for Summary Judgment and will grant judgment in favor of Defendant and against Plaintiff.

An appropriate Order follows.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 00-98

DR. KATE OSUALA,

Plaintiff,

vs.

COMMUNITY COLLEGE OF PHILADELPHIA,

Defendant.

ORDER

AND NOW, this 15th day of August, 2000, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 25), Plaintiff's Response thereto (Doc. No. 27), and Defendant's Reply (Doc. No. 38), **IT IS HEREBY ORDERED** that:

1. Defendant's Motion (Doc. No. 25) is **GRANTED**;

2. Judgment is **GRANTED** in favor of Defendant and against Plaintiff; and

3. The Clerk of Courts shall close this case for statistical purposes.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.

Appendix B

United States Court Of Appeals
For The Third Circuit

Number **00-2463**

Dr. Kate Osuala,

Plaintiff

v.

Community College of Philadelphia,

Defendant

District Court File
No. 00-CV-0098

Plaintiff's Appeal

Statement of the Evidence or Proceedings
FRAP 10(a), 10(c)

The following Statement of the Evidence or Proceedings in the instant matter for FRAP 10(a), 10(c) purposes, based upon Plaintiff's pleadings/exhibits filed of record, defendant's pleadings/exhibits as copied to Plaintiff filed of record, and the District Court's Orders/Memoranda/ Approved Stipulations/Notice(s), is as follows:

Plaintiff's Pleadings & Exhibits:

8/21/00 – Plaintiff's Notice of Appeal (docketed by Clerk of the U.S. Ct. App. for the Third Circuit on 8/22/00);

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8/18/00 – Plaintiff's Motion for Stay of Judgment or Order pending Appeal;

7/28/00 – Plaintiff's Answer to defendant's Motion in Limine to exclude evidence re: Library Supervisors' treatment of Minority Personnel, w/ Memorandum of Law;

7/28/00 – Plaintiff's Answer to defendant's Motion in Limine to exclude evidence of Plaintiff's Unemployment Compensation Award, w/ Memorandum of Law;

7/28/00 – Plaintiff's Answer to defendant's Motion in Limine to exclude and/or limit Plaintiff's Vocational Rehabilitation Expert, etc., w/ Memorandum of Law;

7/28/00 – Plaintiff's Answer to defendant's Motion in Limine to Strike the List of Witnesses in Plaintiff's Pretrial Memorandum, w/ Memorandum of Law;

7/27/00 – Amended Motion in Limine, w/ Memorandum of Law;

7/21/00 – Plaintiff's Motion to Strike defendant's proposed Order filed 7/20/00, to Strike defendant's Reply Brief filed 7/13/00 and Motion for Date Certain w/ attachments (Plaintiff's proposed Verdict Sheet / Jury Interrogatories, Proposed Jury Instructions

and Proposed Stipulations / Admissions of Fact, and, attachments re: defendant's intention to depose Plaintiff's expert) and w/ Memorandum of Law;

7/20/00 – Plaintiff's Answer to defendant's Motion for Sanctions and Attorney's Fees and Costs w/ Memorandum of Law and w/ 5/23/00, 6/27/00 and 7/13/00 letter-exhibits;

7/18/00 – Plaintiff's Answer to defendant's Motion for Attorney's Fees and Costs, w/ Memorandum of Law;

7/14/00 – Plaintiff's Response to defendant's Motion in Limine and Motion to Overrule / Strike defendant's Objections in its Pretrial Memorandum, w/ "Arbitration Results" exhibit and w/ Memorandum of Law;

7/13/00 – Plaintiff's Response to defendant's Motion in Limine and Motion to Overrule / Strike defendant's Objections in its Pretrial Memorandum, w/ "Arbitration Results" exhibit and w/ Memorandum of Law;

7/7/00 – Plaintiff's Motion in Limine w/ Memorandum of Law;

7/3/00 – Plaintiff's Motion to have defendant held in Contempt and to Compel Production w/ Memorandum of Law and w/ exhibits "A"-"C";

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6/30/00 – Plaintiff's Pretrial Memorandum, w/ Plaintiff's Vocational Expert's resume/ curriculum vitae attached;

6/27/00 – Plaintiff's Answer to defendant's Motion for Summary Judgment, with appended thereto the following exhibits:

– Exh. 1 – Johnson memo focusing on Plaintiff's national origin;

– Exh. 2 – Plaintiff's Official Personnel File;

– Exh. 3 – Collective Bargaining Agreement effective 9/1/90 – 8/31/95;

– Exh. 4 – 79 pgs. of Johnson's Arbitration testimony;

– Exh. 5 – 53 pgs. of Dr. Williams' 6/14/00 deposition;

– Exh. 6 – 47 pgs. of Fedorijczuk's Arbitration testimony;

– Exh. 7 – Fedorijczuk letter returning *Know Africa Books*;

– Exh. 8 – Transcript re: Johnson and Fedorijczuk depositions scheduled for 5/5/00;

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- Exh. 9 – 5/10/00 deposition of Professor Rev. Gloria Ware, English Dept., CCP (36 pgs.);

- Exh. 10 – 5/10/00 deposition of Professor Kenneth Martin, English Dept., CCP (32 pgs.);

- Exh. 11 – 4/24/00 deposition of Gary Grissom, Co-Chair, Classified Bargaining Unit, CCP (17 pgs.);

- Exh. 12 – 4/24/00 deposition of Dr. Jack Muraskin, Assistant to the President, CCP (29 pgs.);

- Exh. 13 – 5/2/00 deposition of Richard Bojar, former President / Chair of Faculty Federation, CCP (24 pgs.);

- Exh. 14 – Excerpts of 5/1/00 deposition of Plaintiff (22 pgs.) plus 4/19/00 Order faxed to defense counsel and EEOC intake sheet;

- Exh. 15 – 5/10/00 "Arbitration Results" Faculty Federation Newsletter article;

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– Exh. 16 – Plaintiff's Motion to Amend Complaint;

– Exh. 17 – List of CCP's Ph.D.s during Plaintiff's employment, which accompanied Plaintiff's 3rd Set of Interrogatories / Request for Production;

– Exh. 18 – Plaintiff's early 1999 Unemployment Compensation Referee's Award / Decision and the Unemployment Compensation Board of Review's affirmance;

– Exh. 19 – W-2's of Library Personnel, 1994 – 1998;

6/13/00 – Plaintiff's Motion to Amend her Complaint, w/ Memorandum of Law;

6/13/00 – Plaintiff's Motion to Disqualify defendant's expert and to Quash his report, w/ attached exhibits (reports and resumes / CV's of the parties' experts) and w/ Memorandum of Law;

5/26/00 – Plaintiff's Motion to Strike defendant's Answers to Request for Admissions and to Compel Answers to same, and, to Compel Production of Current Declarations Sheet,

w/ exhibits "A"-"E" attached and w/ Memorandum of Law;

5/25/00 – Plaintiff's Answer to defendant's Motion for Protective Order and Plaintiff's Motion to Disqualify defense counsel, w/ 4 exhibits attached and w/ Memorandum of Law;

5/19/00 – Plaintiff's Motion to Compel and for Sanctions re: W-2's / 1099's of Library Personnel w/ exhibits attached thereto and w/ Memorandum of Law;

5/4/00 – Plaintiff's Motion to Strike defendant's Answers / Objections to Plaintiff's 1st & 2nd Sets of Interrogatories Request for Production, to Compel full, complete answers / responses to same, and, to Preclude defendant's expert w/ attached exhibits and w/ Memorandum of Law;

4/19/00 – Plaintiff's Motion to Strike/ Preclude defendant's Request for Admissions w/ 2 exhibits attached, and, for Protective Order re: Plaintiff's deposition, w/ Memorandum of Law;

2/18/00 – Plaintiff's Pretrial / Settlement Conference Summary Sheet and Synopsis of the Case;

1/7/00 – Plaintiff's Complaint.

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Defendant's Pleadings & Exhibits:

8/9/00 – Defendant's Response to Plaintiff's Amended Motion in Limine w/ Memorandum of Law;

7/26/00 – Defendant's Motions in Limine: to Exclude Evidence re: Library Supervisors' Treatment of Minority Personnel; to Exclude Evidence of Plaintiff's Unemployment Compensation Award; to Exclude Plaintiff's Expert's Report and Certain Expert Testimony; to Strike List Containing Witnesses in Plaintiff's Pretrial Memorandum; all w/ Memoranda of Law;

7/20/00 – Defendant's Proposed Order to be attached to Defendant's Pretrial Memorandum;

7/18/00 – Defendant's Motion for Sanctions and Attorney's Fees and Costs, w/ Memorandum of Law;

7/14/00 – Defendant's Motion for Attorney's Fees and Costs, w/ Memorandum of Law;

7/13/00 – Defendant's Response to Plaintiff's Motion to have defendant held in Contempt and to Compel Production w/ accompanying Memorandum of Law and w/ attached exhibits "A"-"H" as follows:

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- "A" – 6/14/00 Williams deposition, pgs. 1, 22-23, 69-71, 74-75, 79;

- "B" – 2/12/98 Williams letter;

- "C" – 5 mixed pages from 4 different dates from the Arbitration notes of testimony;

- "D" – 2 pgs. of 3/17/96 memo from Plaintiff;

- "E" – 3/24/93 performance report about Plaintiff from prior job / different employer;

- "F" – 7/19/94 Kentucky State Univ. letter;

- "G" – Plaintiff's Trial Exhibit P-7, her UC Award and the UCBR's affirmance (6 pgs.);

- "H" – pgs. 82-85 of "Multi Page" from an otherwise unidentified transcript;

- Also attached thereto but w/o an exhibit designation are 6/1/00 Order apparently faxed from Ct. to defense attorney, 6/7/00 letter from defense attorney and pg. 1, 18 of 5/2/00 deposition of Richard Bojar of CCP;

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7/13/00 – Defendant's Reply Brief to Plaintiff's Response to defendant's Motion for Summary Judgment;

7/13/00 – Defendant's Response to Plaintiff's Motion in Limine w/ Memorandum of Law and w/ Arbitrator's resume attached;

7/7/00 – Defendant's Pretrial Memorandum Encompassing its Motions in Limine w/ defense expert's resume & report;

6/27/00 – Defendant's Response to Plaintiff's Motion to Amend Complaint and Defendant's Response to Plaintiff's Motion to Disqualify defense expert and Quash his report, w/ defense expert's bio and resume and Memorandum of Law attached;

6/13/00 – Defendant's Motion for Summary Judgment, w/ Memorandum of Law and with the following exhibits "A"-"Q":

- "A" – 9/9/99 Arbitrator's Opinion and Award(s);
- "B" – Race / position list of the 18 defense witnesses called in the Arbitration;
- "C" – Random excerpts from random dates of the Arbitration as follows:

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6/23/98 – pgs. 1, 10-13, 18-21, 46-53, 52-65, 82-85, 94-101, 114-129, 138-141, 166-169, 182-185;

7/1/98 – pgs. 214, 231-234, 283-286, 315-318, 327-354, 363-366, 383-386, 407-414;

8/13/98 – pgs. 422, 499-502;

9/14/98 – pgs. 621-625, 634-637, 650-653, 710-713, 722-725, 730-733, 742-745, 754-757;

11/18/98 – pgs. 1188, 1193-1196, 1205-1212;

12/4/98 – pgs. 1403, 1472-1475, 1492-1495, 1536-1539, 1564-1575;

12/11/98 – pgs. 1605, 1610-1613, 1666-1669, 1698-1701;

1/21/99 – pgs. 1778, 1811-1814, 1911-1914, 1935-1938;

3/2/99 – pgs. 1949, 2050-2057, 2066-2073;

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– "D" – 1991 Memorandum from Free Library;

– "E" – Assorted memoranda, numbered by defense as Bates 000001-000010, 000013, 000015, 000018, 000021, 000025, 000031-000035, 000037, 000039-000041, 000044, 000050-000051, 000053, 000053, 000055, 000061-000063, 000081-000083, 000085, 000089, 000091, 000105, 000122-000123, 000128-000131, 000134, 000142, 000148, 000156, 000158, 000172-000173; 000179, 000184-000185, 000187-000188, 000198-000199, 000205-000207, 000221, 000227-000228, 000231;

– "F" – 6/22/94 memo from Plaintiff to Johnson, and 6/15/94 Phila. Health Assoc. letter;

– "G" – List of 8 Library Staff and 2 Students interviewed by Acting Pres. Williams;

– "H" – Dr. Williams' handwritten notes re: his interviews referenced in "G";

– "I" – Dr. Williams' 6/30/97 memo to Faculty Federation officials;

Appendix B

– "J" – 13-pg. case from E.D.N.Y.;

– "K" – copy of 9/1/90-8/31/95 Collective Bargaining Agreement and 9/1/95-8/31/97 Extension of the C.B.A., 1995-1997 College Calendar, Letter of Agreement between Faculty Federation and CCP re: Art. VII dated 2/28/97 and 1-pg. summary / memo apparently faxed from Sheller firm 8/9/99;

– "L" – Pgs. 1, 48, 52-54, 60 of Plaintiff's 5/1/00 deposition;

– "M" – Pg. 4 of defendant's unverified Answers to Plaintiff's Request for Admissions;

– "N" – 7/19/94 letter to Johnson from McDaniel;

– "O" – Pgs. 1 & 18 only of 5/2/00 Bojar deposition;

– "P" – 6/7/00 letter of defense counsel;

– "Q" – Pgs. 1 & 4 only of Plaintiff's Answers to defendant's Request for Admissions;

Appendix B

5/24/00 – Defendant's Motion for Protective Order to Preclude Production of W-2's for the Ph.D.'s employed by defendant during Plaintiff's years of employment by defendant, 2 copies of 2 subpoenas dated 5/15/00 and pages 1 & 18 of 5/2/00 Bojar deposition and Memorandum of Law attached;

4/14/00 – Defendant's Expedited Motion for Protective Order w/ 4 attachments and Memorandum of Law;

4/14/00 – Defendant's Motion to Compel Discovery and for Attorney's Fees, Costs and Sanctions, w/ accompanying Memorandum of Law & 7 attachments;

3/27/00 – Motion for Extension of Time to Serve Expert Report, etc.;

3/8/00 – Defendant's Answer and Affirmative Defenses to Plaintiff's Complaint.

Transcribed Record / District Court's Orders / Memoranda / Approved Stipulations:

8/22/00 – Transcript of 7/24/00 Teleconference submitted by reporter (ordered and paid for 8/15/00);

8/15/00 – Memorandum and Order filed, granting defendant's Motion for Summary Judgment and entering judgment in defendant's favor;

Appendix B

7/25/00 – Order re: 7/24/00 teleconference;

7/10/00 – Order Denying Plaintiff's Motion to Disqualify defense expert and to Quash his report;

6/29/00 – Order Denying Plaintiff's Motion to Amend Complaint;

6/15/00 – Order Denying Plaintiff's request for extension of time to answer Motion for Summary Judgment and Requiring Plaintiff to answer said Motion by 6/27/00 (stamped: filed 6/19/00, docketed 6/20/00; then, mailed to Plaintiff's counsel);

6/1/00 – Order disposing of Plaintiff's Motion to Compel and for Sanctions, Defendant's Motion for Protective Order, Plaintiff's Response to Defendant's Motion for Protective Order and Motion for Disqualification of defense counsel, and Plaintiff's Motion to Strike Defendant's Answers to Plaintiff's 1st Req. for Adm. and to Compel Ans. to same and to Compel Production of Declarations Sheet;

6/1/00 – Order Amending Scheduling Order;

5/24/00 – Order Granting Defendant's request for Extension of Time to file Dispositive Motions by 6/13/00;

Appendix B

5/10/00 – Order Dismissing / Denying Plaintiff's Motion to Strike defendant's Ans. / Objections to Plaintiff's 1st Req. for Production and to Preclude Defendant's Expert's testimony;

4/19/00 – Order disposing of defendant's Motion for Protective Order, defendant's Motion to Compel, Plaintiff's Motion for Protective Order, defendant's Motion for Attorney Fee Costs, Plaintiff's Motion to Strike / Preclude defendant's 1st Req. for Admissions, and, Ordering discovery meeting;

3/30/00 – Order re: Stipulation re: Amending Scheduling Order;

3/27/00 – Order re: Stipulation re: Amending Scheduling Order;

3/8/00 – Ct.-ordered Settlement Conference;

2/16/00 – Scheduling Order;

2/14/00 – Notice of Settlement Conference faxed to both counsel;

1/28/00 – Ct. approved Stipulation for defendant to have Extension of Time until 3/9/00 to Respond to Plaintiff's Complaint.

Appendix B

Respectfully Submitted,
DERRICK W. COKER, ESQUIRE

s/ Derrick Coker
Derrick W. Coker, Esq.
Suite 202 – Lewis Tower Bldg.
225 So. 15th Street
Philadelphia, PA. 19102
(215) 732-2750

9/5/00
Date

Attorney for: Plaintiff / Appellant,
Dr. Kate Osuala

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Number 00-2463

Plaintiff's Appeal

DR. KATE OSUALA

V.

COMMUNITY COLLEGE OF PHILADELPHIA

District Court File
NO. 00-CV-0098

CERTIFICATION OF SERVICE

I, Derrick W. Coker, Esq., attorney for the Plaintiff, hereby Certify that today, the 5th day of September, 2000, I served a true and correct copy of the foregoing Plaintiff's Statement of the Evidence or Proceedings per FRAP 10(a), 10(c) upon the below-listed as indicated, and that a copy of same was previously served upon / delivered via facsimile transmission and regular mail to the below-listed opposing counsel on the 23rd day of August 2000 to the same facsimile number and address listed below:

Jeffrey P. Scarpello, Esquire
FOX ROTHSCHILD O'BRIEN & FRANKEL, LLP.
2000 Market Street
Philadelphia, PA. 19103
(to facsimile # 215-299-2150
and via First Class Mail)

Appendix B

Hon. John R. Padova
United States District Court
Eastern District of Pennsylvania
U.S. Courthouse – Room 6614
601 Market Street
Philadelphia, PA. 19106 (hand-delivered)

DERRICK W. COKER, ESQUIRE

s/ Derrick Coker
Derrick W. Coker, Esq.
Suite 202 – Lewis Tower Bldg.
225 So. 15th Street
Philadelphia, PA. 19102
(215) 732-2750

9/5/00
Date

Attorney for: Plaintiff,
Dr. Kate Osuala

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Number 00-2463

Plaintiff's Appeal

DR. KATE OSUALA

V.

COMMUNITY COLLEGE OF PHILADELPHIA

District Court File
NO. 00-CV-0098

CERTIFICATION OF SERVICE

I, Derrick W. Coker, Esq., attorney for the Plaintiff, hereby Certify that today, the 23rd day of August, 2000, I served a true and correct copy of the foregoing Plaintiff's Statement of the Evidence or Proceedings per FRAP 10(a), 10(c) upon the below-listed opposing party / counsel via facsimile transmission to 215-299-2150 and via First Class Mail, Postage Prepaid mailed to:

Jeffrey P. Scarpello, Esquire
FOX ROTHSCHILD O'BRIEN & FRANKEL, LLP.
2000 Market Street
Philadelphia, PA. 19103

Appendix B

DERRICK W. COKER, ESQUIRE

s/ Derrick Coker
Derrick W. Coker, Esq.
Suite 202 – Lewis Tower Bldg.
225 So. 15th Street
Philadelphia, PA. 19102
(215) 732-2750

8/23/00
Date

Attorney for: Plaintiff,
Dr. Kate Osuala

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2463

KATE OSUALA, DR.,

Appellant

v.

COMMUNITY COLLEGE OF PHILADELPHIA

(D.C. Civ. No. 00-cv-00098)

SUR PETITION FOR REHEARING

Present: SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, GARTH* and STAPLETON*, *Circuit Judges*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the

---

* As to panel rehearing only.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Scirica
Circuit Judge

Dated: JUN 19 2001

APPENDIX D — ORDERS ISSUED BY THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED FEBRUARY 20, 2001, MARCH 27, 2001, MAY 9, 2001, LETTER FROM CLERK'S LEGAL ADVISOR DATED MARCH 21, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. *00-2463*

Osuala

v.

Comm College Phila,

To: Clerk

1) Motion by Appellees to File a Supplemental Appendix

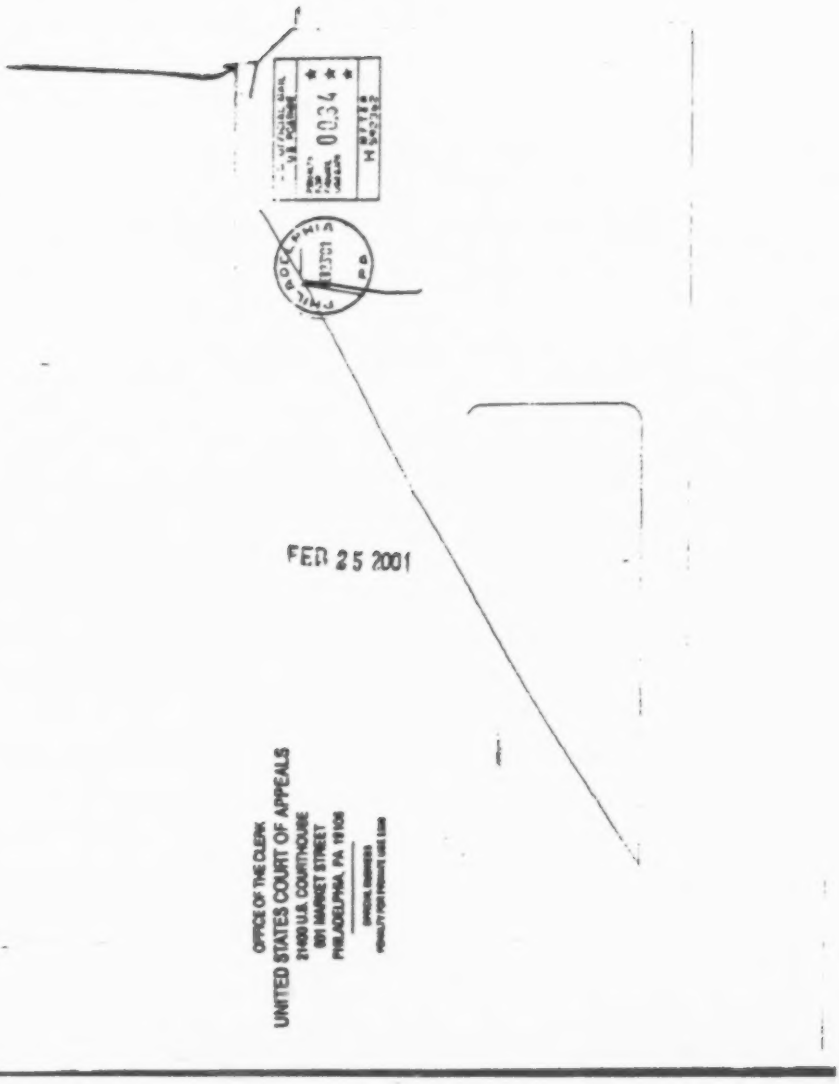
The foregoing Motion is granted with filing as of February 20, 2001

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: FEB 20 2001

Appendix D


FEB 25 2001
OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
21400 U.S. COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

March 27, 2001

No. *00-2463*

Osuala

v.

Community College of Philadelphia

To: Clerk

1) Motion by Appellant, Kate Osuala, to strike or disallow Appellee's brief and Appellee's argument.

2) Letter dated 2/23/01 from Appellee, Community College of Philadelphia, construed as a response to motion by Appellant, Kate Osuala, to strike or disallow Appellee's brief and Appellee's argument.

3) Supplemental Response by Appellee, Community College of Philadelphia, to motion by Appellant, Kate Osuala, to strike or disallow Appellee's brief and Appellee's argument.

4) Motion by Appellee, Community College of Philadelphia, to file supplemental appendix.

Appendix D

5) Copy of Clerk's Order dated 2/20/01 granting motion by Appellee, Community College of Philadelphia, to file supplemental appendix.

6) Reply by Appellant, Kate Osuala, to Response by Appellee, Community College of Philadelphia, to motion to strike or disallow Appellee's brief and Appellee's argument and Response by Appellant, Kate Osuala, to motion by Appellee, Community College of Philadelphia, to file supplemental appendix.

7) Letter Dated March 10, 2001 from Derrick W. Coker, Esquire to the Chief Judge of this Court.

8) Appellant's Motion to Vacate the Clerk's Order of 2/20/01 and to Strike the Supplemental Appendix filed 2/20/01.

9) Letter Dated March 12, 2001 from Derrick W. Coker, Esquire to the Chief Judge of this Court.

10) Clerk's Letter to Derrick W. Coker, Esquire Dated March 21, 2001.

11) Response by Appellee Comm College Phila in response to Osuala's Motion to Vacate the Clerk's Order of February 20, 2001 and to Strike the Supplemental Appendix filed February 20, 2001.

12) Reply by Appellant to Appellee's Answer to Appellant's Motion to Vacate Clerk's Order of 2/20/01.

Appendix D

The foregoing Motions and Letters are referred to the merits panel for consideration and disposition.

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: March 27, 2001

cc: Derrick W. Coker, Esquire
Jeffrey P. Scarpello, Esquire

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. *00-2463*

Osuala

v.

Community College of Philadelphia

To: Clerk

1) Letter Dated May 8, 2001 from Derrick W. Coker, Esquire

The foregoing Letter is considered. The docket will be corrected to refleet the filing of the Appellant's Reply to Appellee's Answer to Appellant's Motion to Vacate the Clerk's Order of 2/20/01 on March 22, 2001.

It appears that there were two versions of the Clerk's March 27, 2001 order referring matters to the merits panel prepared. One version reflected the referral of the March 22, 2001 Reply and one, prepared prior to receipt of that Reply, did not. It appears that the March 22, 2001 Reply was sent to merits panel at the time the order was issued. However, insofar as the docket reflects that the version of the order without the March 22, 2001 Reply listed was actually issued, the Reply will be transmitted to the merits panel at this time to ensure that the judges have received it.

Appendix D

Letters of the type issued by the Clerk on May 2, 2001 are normally treated as general correspondence and not listed on the docket. However, in light of counsel's request that it be docketed, the letter will be entered on the docket.

To the extent Counsel's letter requests oral argument, it is referred to the merits panel.

For the Court,

s/ Marcia M. Waldron
Clerk

Dated: May 9, 2001
cc: Derrick W. Coker, Esquire
Jeffrey P. Scarpello, Esquire

Appendix D

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA 19106-1790

MARCIA M. WALDRON
CLERK

TELEPHONE
215-597-2995

March 21, 2001

Derrick W. Coker, Esquire
1800 Callowhill Street
3rd Floor
Philadelphia, PA 19130

Re: Osuala v. Community College of Philadelphia
3rd Cir. No. 00-2463

Dear Mr. Coker:

The Chief Judge of this Court has requested that this office respond to your letters to him dated March 10, 2001 and March 12, 2001. The Chief Judge is recused in regard to matters dealing with the law firm of Fox Rothschild O'Brien & Frankel and, therefore cannot intervene in this matter.

The Chief Judge has, however, directed that your letters be referred to the panel of judges who will consider the merits. The letters will be considered with the Motion to Strike or Disallow Appellee's Brief, Motion to Vacate

Appendix D

Clerk's Order of February 20, 2001 and other pending submissions. Those judges will determine whether to refer your letters to the Court's Standing Committee on Attorney Discipline or if other action is appropriate.

Very truly yours,

Marcia M. Waldron, Clerk

By: s/ Bradford A. Baldus
Bradford A. Baldus
Senior Legal Advisor to the Clerk

cc: Merits Panel Judges
Jeffrey P. Scarpello, Esquire

APPENDIX E — ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA: DENYING EXTENSION OF TIME TO ANSWER APPELLEE'S RULE 56 MOTION MAILED 7 DAYS BEFORE THE ANSWER WAS DUE; DENYING APPELLANT'S RULE 15 MOTION, AND; GRANTING APPELLEE'S MOTION FOR PROTECTIVE ORDER RE: THE W-2'S OF APPELLEE'S OTHER Ph.D.'S

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 00-98

DR. KATE OSUALA,

Plaintiff,

vs.

COMMUNITY COLLEGE OF PHILADELPHIA,

Defendant.

ORDER

AND NOW, this 15th day of June, 2000, **IT IS HEREBY ORDERED** that Plaintiff shall file and serve a Response to Defendant's Motion for Summary Judgment (Doc. No. 25) no later than June 27, 2000.[1]

BY THE COURT:

s/ John R. Padova
John R. Padova, J.

---

1. Defendant's Motion was filed and served on June 13, 2000. Pursuant to Local R. Civ. P. 7.1(c), Plaintiff's Response is due fourteen days thereafter.

Appendix E

2:00-cv-00098

DERRICK W. COKER, Esq. gmk
LEWIS TOWER BLDG., 225 SOUTH 15TH STREET
PHILA, PA 19102

ENTERED
JUN 20 2000
CLERK OF COURT

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 00-0098

DR. KATE OSUALA,

Plaintiff,

vs.

COMMUNITY COLLEGE OF PHILADELPHIA,

Defendant.

ORDER

AND NOW this 29th day of June, 2000, upon consideration of Plaintiff's Motion to Amend Complaint, and Defendant's Response thereto, **IT IS HEREBY ORDERED** that Plaintiff's Motion to Amend Complaint (Doc. 23) is **DENIED.**[1]

---

1. On June 13, 2000, Plaintiff filed a Motion to Amend her Complaint. Plaintiff seeks to add as parties Jack Muraskin, Joan Johnson, Jaraslaw Fedorijczuk and Rick Bojar, and to add claims of violations by the original and additional defendants of 42 U.S.C. §1981, 42 U.S.C. § 1983, and 43 P.S. §955. In addition, Plaintiff wishes to Amend her claim for punitive damages to be asserted against the original and newly added Defendants. Defendant opposes this Motion.

Rule 15(a) of the Federal Rules of Civil Procedure provides
(Cont'd)

Appendix E

BY THE COURT:

s/ John R. Padova
John R. Padova, J.

(Cont'd)
that a party may amend its pleading after a responsive pleading only by leave of the court, and "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15 (a). Denial of leave to amend may be based on "truly undue or unexplained delay . . . or futility of amendment." *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993). Courts agree that "[a]t some point, delay will become 'undue' placing an unwarranted burden on the court, or will become 'prejudicial,' placing an unfair burden on the opposing party." *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985). The party seeking leave to amend bears the burden of explaining the reasons for delay. *LePage's Inc. v. 3M*, No. CIV. A. 97-3983, 1998 WL 631960, at *4 (E.D.Pa. Sept. 2, 1998).

The Court finds that Plaintiff's delay in waiting until this late date to move to Amend is "truly undue." Discovery has closed, and the case is in the July trial pool. Moreover, the claims proposed in Plaintiff's Motion to Amend appear to be futile. Because Plaintiff has failed to attach her Amended Complaint, the Court finds it difficult to understand her allegations. Plaintiff's assertion that she only recently discovered grounds for these additional claims against the original Defendant strains the Court's credulity in light of the fact that this case has already been through arbitration and discovery. For the foregoing reasons, the Court denies Plaintiff's Motion.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 00-98

DR. KATE OSUALA,

Plaintiff,

vs.

COMMUNITY COLLEGE OF PHILADELPHIA,

Defendant.

ORDER

AND NOW, this 1st day of June, 2000, upon consideration of Plaintiff's Motion to Compel Production and for Sanctions (Doc. No. 16), Defendant's Motion for Protective Order (Doc. No. 17), Plaintiff's Response thereto and Motion for Disqualification of Defense Counsel (Doc. No. 18), and Plaintiff's Motion to Strike Defendant's Answers to Plaintiff's First Request for Admissions, and to Compel Full, Responsive and Complete Answers Thereto, and to Compel Production of the Declarations Sheet (Doc. No. 20), in light of the conference in chambers on May 31, 2000, **IT IS HEREBY ORDERED** that:

1. Plaintiff's Motion to Compel Production (Doc. No. 16) is **GRANTED** with the proviso that Plaintiff and Defendant shall execute a confidentiality agreement regarding the documents requested in this Motion.

2. Said Motion for Sanctions (Doc. No. 16) is **DENIED**.

3. Defendant's Motion for Protective Order (Doc. No. 17) is **GRANTED** in part and **DENIED** in part.

4. Said Motion (Doc. No. 17) is **DENIED** in that Defendant shall identify its employees with the same professional degrees and teaching experience as Plaintiff who were earning more money than Plaintiff in the years 1996-1998.

5. Defendant shall produce W-2 forms or 1099 forms for said employees, subject to a confidentiality agreement that Plaintiff and Defendant shall execute.

6. Said Motion (Doc. No. 17) is **GRANTED** in all other respects.

7. Plaintiff's Motion for Disqualification of Defense Counsel (Doc. No. 18) is **DENIED**.

8. Plaintiff's Motion to Strike Defendant's Answers to Plaintiff's First Request for Admissions, and to Compel Full, Responsive and Complete Answers Thereto, and to Compel Production of the Declarations Sheet (Doc. No. 20) is **GRANTED** in part and **DENIED** in part.

9. Said Motion (Doc. No. 20) is **GRANTED** in that Defendant shall file an amended response to Plaintiff's Request for Admission No. 1.

10. Said Motion (Doc. No. 20) is **DENIED** in all other respects.

Appendix E

11. Defendant shall produce all information pursuant to this Order within seven (7) days of the date of this Order.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.

APPENDIX F — APPELLANT'S MOTION TO STRIKE APPELLEE'S BRIEF AND SUPPLEMENTAL APPENDIX, APPELLANT'S MOTION TO VACATE CLERK'S ORDER OF FEBRUARY 20, 2001 AND APPELLANT'S LETTERS TO CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 10, 2001 AND MARCH 12, 2001 AND ULTRA VIRES ORDER OF THE DISTRICT COURT DATED MARCH 8, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2463

OSUALA

vs.

COMM COLLEGE PHILA

ORDER

AND NOW, this __ day of _____, 2001 upon consideration of Appellant's Motion to Strike or Disallow appellee's Brief and Appendix, it is hereby **ORDERED and DECREED** that appellee's Brief and Appendix are Stricken/Disallowed and this matter shall be decided upon Appellant's Brief and Appendix and Argument from Appellant only.

BY THE COURT:

_____
J.

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2463

OSUALA

vs.

COMM COLLEGE PHILA

Appellant's Motion to Strike or Disallow
Appellee's Brief and Appellee's Argument

Appellant Dr. Kate Osuala, by and through her undersigned counsel, hereby Moves that this Honorable Court Strike or Disallow appellee's Brief and Appendix and Argument in the instant matter, same not having been served upon counsel for Appellant within 30 days of 1/18/01, more fully averring as follows:

1. Appellant filed her Brief and Appendix on 1/18/01, and served a copy of same upon opposing counsel via hand-delivery 1/18/01.

2. This Honorable Court's instructions re: filing the Briefs of the parties, as well as FRAP 31 requires appellee to file and serve appellee's Brief within 30 days after the Appellant's Brief is served, which would have required appellee to file and serve appellee's Brief by 2/17/01; that day being a Saturday, appellee should have served its Brief either by Friday, 2/16/01 or by Tuesday, 2/20/01.

Appendix F

3. Upon service of Appellant's Brief and Appendix, appellee was on notice that counsel for Appellant was moving his office effective 1/29/01 and counsel's new address is prominently indicated on Appellant's Brief and Appendix.

4. On or about 1/20/01 and again on 2/2/01, counsel for Appellant corresponded with this Honorable Court and with appellee's counsel, indicating the current location of Appellant's counsel's office and the Calendaring Clerk of this Honorable Court sent her 2/1/01 Notice to counsel's current address which was received 2/2/01 and a copy of the 2/2/01 letter is attached hereto; despite same, appellee's counsel purposely misdirected a copy of correspondence dated 2/5/01 to this Honorable Court to Appellant's counsel's old office, thereby causing a delay of 1 week before counsel received same; a copy of appellee's counsel's envelope evidencing the foregoing is attached hereto.

5. FRAP 31 indicates that Appellant's counsel has only 14 days after service to file a Reply Brief to appellee's Brief; therefore, appellee's misdirection of its Brief to counsel's former office — which Brief still has not been received upon the filing of the instant Motion — would be a purposeful attempt to both deceive this Honorable Court as to whether appellee honestly and actually served its Brief upon Appellant's counsel as required by FRAP 31, and, would be a purposeful attempt to prejudice Appellant's ability to timely file a Reply Brief.

6. Incorporating herein by reference paragraphs 1 – 5 of this Motion as if same were more fully set forth herein at length, Appellant Moves this Honorable Court to Strike/

Appendix F

Disallow appellee's Brief, Appendix and Argument, as proper sanctions for appellee's purposeful refusal to follow FRAP 31(a)(1) and pursuant to FRAP 31(c).

Respectfully Submitted,
DERRICK W. COKER, ESQUIRE

s/ Derrick W. Coker
Derrick W. Coker, Esq.
Attorney I.D. # 38936
1800 Callowhill St. – 3rd Fl.
Philadelphia, PA. 19130
(215) 636-0153

Attorney for Appellant,
Dr. Kate Osuala

2/21/01
Date

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2463

OSUALA

vs.

COMM COLLEGE PHILA

Memorandum of Law in
Support of Appellant's Motion

FRAP 31 controls the Serving and Filing of Briefs in this Honorable Court. In pertinent part, appellees "must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief . . . .".

Appellee made no attempt to serve Appellant's counsel with appellee's Brief by 2/16/01, which would have adhered to FRAP. Nor was any attempt made to serve Appellant's counsel with appellee's Brief by 2/20/01. Indeed, to date, appellee's Brief has not been received.

Any attempt to "serve", and any Affidavit of Counsel for appellee re: any attempt to "serve" Appellant's counsel by sending or delivering appellee's Brief to any address other than 1800 Callowhill St., 3rd Fl., Phila., PA. 19130, would be consistent with appellee's ongoing deceptive conduct in this matter and would be a purposeful attempt to deceive

this Honorable Court and to prejudice Appellant. Such should not be condoned, and a proper Sanction is to Strike/Disallow appellee's Brief/Appendix and to Bar appellee from Argument Accordingly, Appellant respectfully Moves this Honorable Court to grant the relief requested.

Respectfully Submitted,
DERRICK W. COKER, ESQUIRE

s/ Derrick W. Coker
Derrick W. Coker, Esq.

2/21/01
Date

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2463

OSUALA

vs.

COMM COLLEGE PHILA

CERTIFICATION OF SERVICE

I, Derrick W. Coker, Esq. am the Attorney for the Appellant herein, and I hereby Certify that I served a true and correct copy of the foregoing Motion to Strike or Disallow appellee's Brief and Appendix and to Deny/Bar appellee's Oral Argument via First Class Mail to the below-listed opposing counsel/party today:

Jeffrey P. Scarpello, Esquire
FOX ROTHSCHILD O'BRIEN & FRANKEL, LLP.
2000 Market Street
Philadelphia, PA. 19103

2/21/01
Date

s/ Derrick W. Coker
Derrick W. Coker, Esq.
Attorney I.D. # 38936
1800 Callowhill St. – 3rd Fl.
Philadelphia, PA. 19130
(215) 636-0153

Attorney for Appellant,
Dr. Kate Osuala

Appendix F

Law Offices Of
DERRICK W. COKER

Derrick W. Coker, Esq.
(215) 636-0153
(*fax*) 636-0157

1800 Callowhill Street
3rd Floor
***Philadelphia, PA.* 19130**

February 2, 2001

Ruth Ramos, Calendaring Clerk
Office of the Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA. 19106

RE: Osuala v. Comm College Phila
No. 00-2463
Availability for Listing on the Merits

Dear Ms. Ramos:

Thank you for yours of 2/1/01. I am available to argue this Appeal any of the weeks indicated: 4/2/01, 4/16/01 and 4/23/01.

Please note that I am a Sole Practitioner, with an active practice in Criminal Law, Workers Compensation, Personal Injury and other areas. So, the earlier during the April 2001 Listing period that this Appeal is listed, the better.

Once the Listing date is set, please feel free to fax notice of same to me.

Appendix F

Thank you for your courtesy and cooperation.

Very Truly Yours,

s/ Derrick W. Coker
Derrick W. Coker

cc: Jeffrey P. Scarpello, Esq.
Dr. Kate Osuala

Appendix F

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 United Sstates Courthouse
601 Market Street
Philadelphia PA 19106-1790
pacer.ca3.uscourts.gov

Marcia M. Waldron
Clerk

Telephone
267-299-4939

February 1, 2001

Derrick W. Coker
Jeffrey P. Scarpello

RE: Osuala vs. Comm College Phila *NO. 00-2463*

TO BE ANSWERED BY COUNSEL, ASSOCIATE ATTORNEYS, OR A MEMBER OF YOUR SUPPORT STAFF, WITHIN FIVE (5) DAYS OF THE DATE OF THIS LETTER.

The above-entitled case(s) is(are) currently considered for listing on the merits during the weeks of 04/02/01, 04/16/01 and 04/23/01 **Philadelphia, PA**.

If you are aware of any substantial reason why you or the attorney to argue this matter will not be available during the above weeks; you, an associate attorney, or a member of your support staff are directed to advise this office

immediately in writing within 5 days of the date of this letter. *THEREAFTER, REQUESTS TO CHANGE THE DATE OF ARGUMENT WILL BE ENTERTAINED ONLY IN THE EVENT OF AN EMERGENCY THAT WAS NOT, AND COULD NOT, HAVE BEEN REASONABLY ANTICIPATED.* You, an attorney from your firm, or other counsel will be expected to present argument if directed by the Court.

The reasons which the court considers substantial enough to reschedule argument from the proposed dates listed include pre-paid vacations and family obligations. **Such reasons normally do not include scheduling conflicts for purposes of conducting court proceedings or discovery in trial courts absent extraordinary circumstances or some showing why a continuance could not be obtained.** Normally counsel in firms will be expected to have another member of the firm argue, rather than request the Court to reschedule arguments.

Any response indicating that you or a member of your firm are not available during this period must be served on opposing counsel. Counsel may respond by facsimile machine for this purpose only; 215-597-2643. **In the event this case is not scheduled for the above week(s), you will receive a similar letter inquiring about your availability. Nothing herein relieves counsel of the obligation to respond to pending motions.**

If you have any questions about whether your case is listed, please call this office.

Appendix F

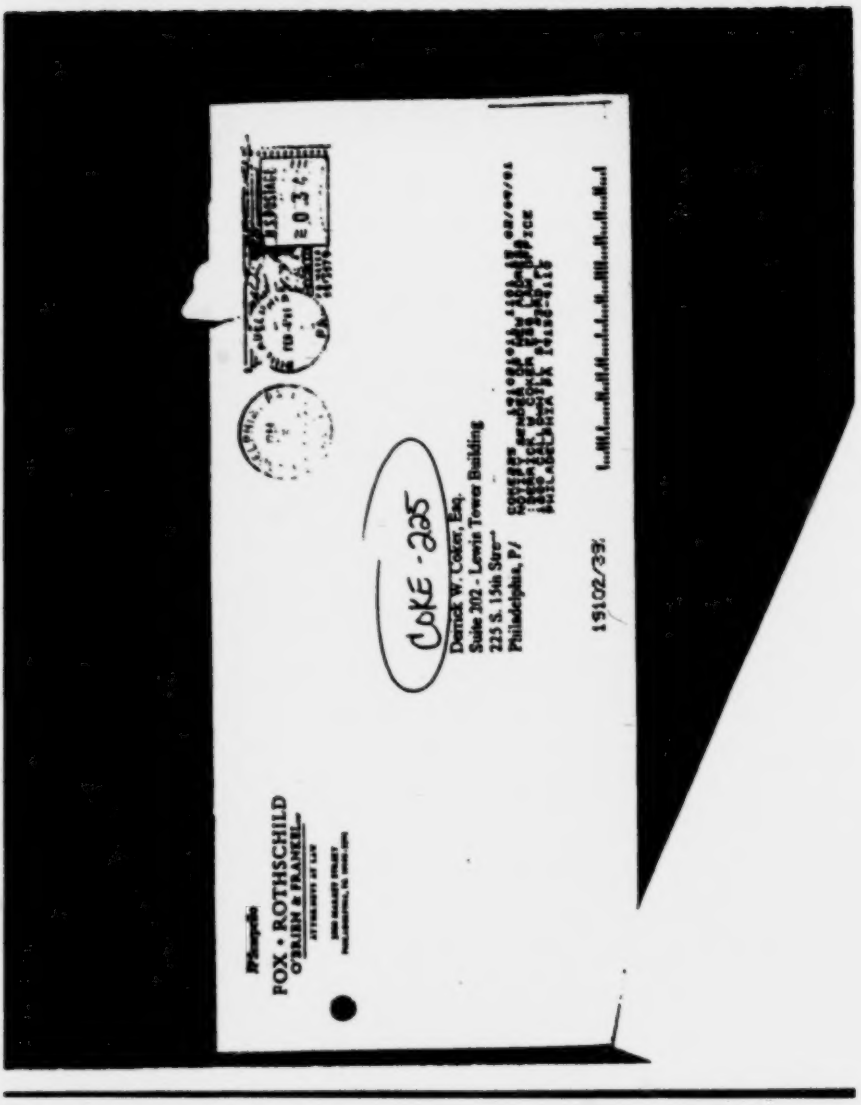
Very truly yours,
MARCIA M. WALDRON
Clerk

s/ Ruth Ramos/af
Ruth Ramos
Calendaring Clerk

Appendix F

Derrick W. Coker, Esq.
1800 Callowhill Street
3rd Floor
Philadelphia, PA 19130

Appendix F


FOX • ROTHSCHILD
O'BRIEN & FRANKEL
COKE - 205
Derrick W. Coker, Esq.
Suite 2102 - Lewis Tower Building
225 S. 15th Street
Philadelphia, PA
19102/33

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2463

DR. KATE OSUALA,

Appellant

V.

COMM COLLEGE PHILA,

Appellee

ORDER

And Now, this __ day of March 2001, upon Appellant's Motion to Vacate the Clerk's Order of 2/20/01 and any answer thereto, said Order is Vacated and appellee's Supplemental Appendix is Stricken.

BY THE COURT:

_____
J.

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2463

DR. KATE OSUALA,

Appellant

V.

COMM COLLEGE PHILA,

Appellee

Appellant's Motion to Vacate the Clerk's Order of 2/20/01 and to Strike the Supplemental Appendix filed 2/20/01

1. On or about 2/20/01, the Clerk of Court issued an Order in the instant matter, granting appellee leave to file its Supplemental Appendix.

2. As appears in this Court's docket entries of 2/27/01, said Clerk's Order was issued simultaneously with appellee's actual filing of its Motion for Leave to do so that same day 2/20/01.

3. The Clerk's Order was entered/issued before Appellant had even received appellee's Motion, noting that as indicated in Appellant's Motion to Strike appellee's Brief, etc. filed 2/21/01, as of 2/21/01 Appellant had not been served with appellee's Brief nor with its Supplemental Appendix

nor with its Motion for Leave to file said Supplemental Appendix; indeed, appellee's Brief, Supplemental Appendix and Motion for Leave were not served upon Appellant until after the 30-day period for doing so had expired, to wit, not until they were hand-delivered 2/23/01. The Clerk's 2/20/01 Order, notably, was mailed to Appellant 2/23/01 (copy of the Order and envelope attached).

4. Appellee never made any attempt to secure agreement with Appellant as to any supplementation of the Appendix which had already been prepared and filed by Appellant 1/18/01, and appellee certainly did not seek same within 10 days of hand-delivery to its counsel of Appellant's Appendix on 1/18/01; hence, appellee must be deemed to have waived any question as to Appellant's Appendix.

5. Appellee's Motion for Leave to file its Supplemental Appendix was not merely seeking ministerial nor mere procedural relief; rather, as the Motion itself states, it seeks to have the Court review the Supplemental Appendix as part of its plenary review of the record below; however, absolutely nothing in appellee's Supplemental Appendix is cited with particularity by the district court as the basis of its decision below, nor does the Supplemental Appendix contain any of the evidence presented below by Appellant — which the district court was required to review but deliberately did not — nor does the Supplemental Appendix bear any docket entries though in the body of appellee's Motion for Leave it implies that missing docket entries needed to be presented to the Court.

6. As appellee's Motion for Leave sought plenary review from this Court, and was not seeking Court assistance

in preparing the Appendix as the Appendix again had already been prepared and served 33 days earlier, this Motion was not one upon which the Clerk may issue an Order without comment from Appellant, and the Clerk's action doing so subverted Appellant's rights to Fundamental Fairness and Due Process in this matter.

7. Incorporating herein by reference paragraphs 1 – 6 of this Motion, the Order of 2/20/01 was improvidently and improperly granted/issued, must be Vacated, and the Supplemental Appendix Stricken.

WHEREFORE, Appellant respectfully Moves that this Honorable Court grant the instant Motion.

Respectfully Submitted,
DERRICK W. COKER, ESQUIRE

s/ Derrick W. Coker
Derrick W. Coker, Esq.
Attorney I.D. # 38936
1800 Callowhill Street – 3rd Fl.
Philadelphia, PA. 19130
(215) 636-0153

3/11/01
Date

Attorney for Appellant,
Dr. Kate Osuala

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 00-2463

DR. KATE OSUALA,

Appellant

V.

COMM COLLEGE PHILA,

Appellee

Memorandum of Law in Support of Vacating Order and Striking the Supplemental Appendix filed 2/20/01

In the instant matter, the appellee filed a Motion for Leave to file a Supplemental Appendix 2/20/01 — the dockets of 2/27/01 claim this was done by mail — the Clerk issued an Order allowing same 2/20/01, the Supplemental Appendix was filed 2/20/01, and all of this improper action occurred before Appellant was served with the Supplemental Appendix. Then, interestingly, the same day that appellee served a copy of its late Brief and Supplemental Appendix and Motion for Leave via hand-delivery, being 2/23/01, the Clerk mails to Appellant a copy of its Order of 2/20/01 (see attached Order and envelope).

The patent impropriety of these actions is self-evident and not countenanced by the Federal Rules of Appellate Procedure. Normally, if appellee questions anything in an Appendix, it is required to raise such questions with

Appendix F

Appellant within 10 days of receipt of the contents of the Appendix. FRAP 30(b)(1). Neither on 12/28/00 nor at any time between 12/28/00 and 2/20/01 did appellee make any attempt to contact Appellant regarding any proposed addition to the Appendix. Of course, appellee makes no mention of this crucial fact in its Motion for Leave. As it did not do so, appellee must be deemed to have waived any questions as to the Appendix filed and served upon it 1/18/01. Local Rule 27.6 may not be relied upon to support the Clerk's 2/20/01 Order because appellee's Motion does not seek mere ministerial action and it does not relate to the preparation of the Appendix as the Appendix was already prepared, filed and served 33 days before the 2/20/01 Motion was filed.

Appellee's Motion for Leave, by its own language, was not seeking any mere procedural action, but rather seeks to have the Court review the Supplemental Appendix for substantive purposes as part of its plenary review of the Decision below. Hence, FRAP 27(b) is equally inapposite.

Fundamental Fairness and Due Process required that Appellant be given an opportunity to be heard as to the Motion for Leave to file the Supplemental Appendix before any Order disposing of it was issued. The Clerk's Order does severe violence to Appellant's fundamental rights, and must be Vacated and the Supplemental Appendix Stricken.

Respectfully Submitted,
DERRICK W. COKER, ESQUIRE

3/11/01
Date

s/ Derrick W. Coker
Derrick W. Coker, Esq.
Attorney for Appellant, Dr. Osuala

Appendix F

CERTIFICATION OF SERVICE

I, Derrick W. Coker, Esq., attorney for Appellant, hereby Certify that I served the foregoing Motion to Vacate the Clerk's Order of 2/20/01 and to Strike the Supplemental Appendix filed 2/20/01 upon the below-listed today via Certified Mail:

Marcia M. Waldron,
Clerk of Court
U.S. Ct. of App. –
Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA. 19106
Cert.# 70001530000629214736

Jeffrey P. Scarpello, Esq.
FOX ROTHSCHILD
O'BRIEN & FRANKEL, LLP.
2000 Market Street
Philadelphia, PA. 19103
Cert.# 70001530000629214729

3/11/01
Date

s/ Derrick W. Coker
Derrick W. Coker, Esq.

Appendix F

ATTACHMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. *00-2463*

Osuala

v.

Comm College Phila,

To: Clerk

1) Motion by Appellees to File a Supplemental Appendix

The foregoing Motion is granted with filing as of February 20, 2001

For the Court,

s/ Marcia M. Waldron
Clerk

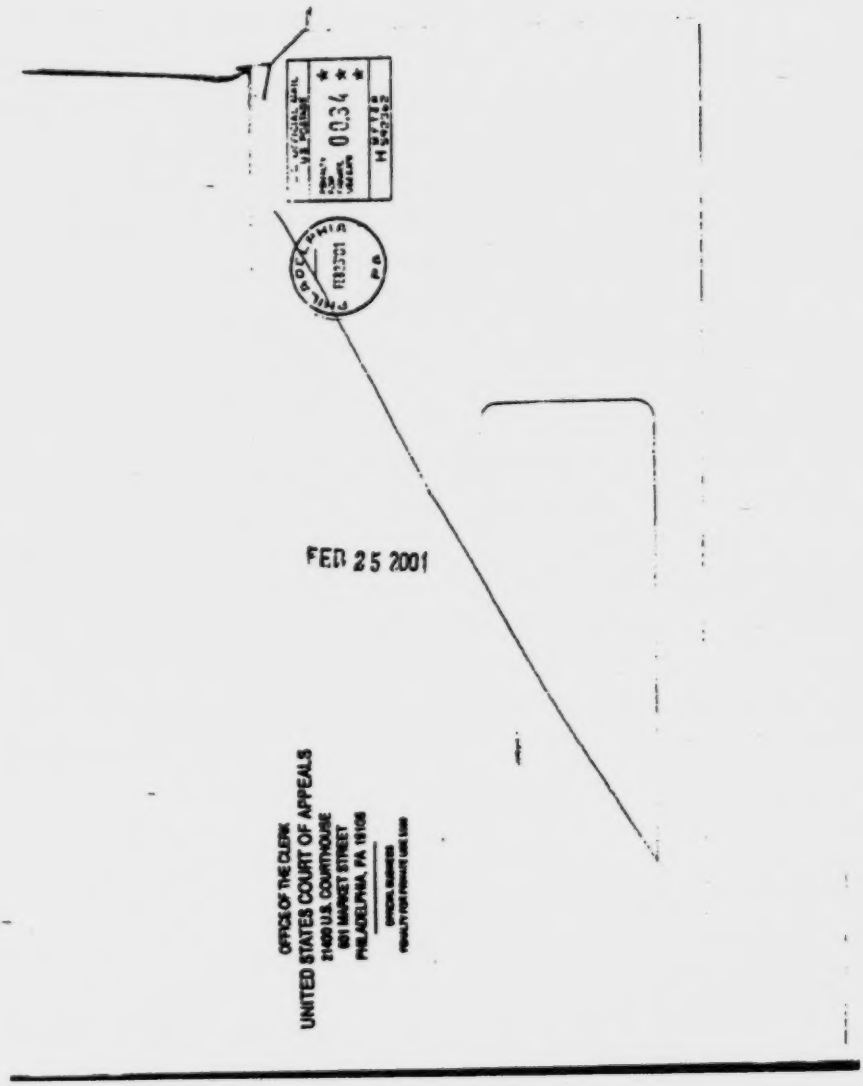
Dated: FEB 20 2001

Appendix F

Derrick W. Coker, Esq.
3rd Floor
1800 Callowhill Street
Philadelphia, PA 19130

FEB 25 2001

Appendix F



BEST AVAILABLE COPY

Appendix F

Law Offices Of
DERRICK W. COKER

Derrick W. Coker, Esq.
(215) 636-0153
***(fax)* 636-0157**

1800 Callowhill Street
3rd Floor
***Philadelphia, PA.* 19130**

Hon. Edward R. Becker,
Chief Judge
United States Court of Appeals
for the Third Circuit
19613 U.S. Courthouse
601 Market Street
Philadelphia, PA. 19106

March 12, 2001

Hand-Delivered
& via Certified Mail
7000167000085579531

RE: Osuala v. Comm College Phila
Docket No. 00-2463
Fraud by the appellee

Dear Chief Judge Becker:

This morning staff at this office building opened a large anonymous envelope left upon the receptionist's desk at some time between Friday 3/9/01 and yesterday.

Upon opening the anonymous envelope, it was discovered that the contents were addressed to me re: the instant matter.

Enclosed are copies of the anonymous envelope, the 3/9/01 letter of appellee's counsel, the 2/20/01 cover letter of appellee's counsel addressed to my old office, the envelope allegedly mailed to my old office 2/20/01 and appellee's counsel's 2/20/01 letters to the Clerk.

Appendix F

Stevland Morris a/k/a Stevie Wonder can see that the 2/20/01 envelope was never received by the U.S. Postal Service as it bears meter postage *but no postmark*. We all know that the U.S. Postal Service knew where I'd moved my office in January 2001, and we have already provided this Honorable Court with a copy of the envelope from appellee's counsel in which a copy of its 2/5/01 letter to the Calendaring Clerk was mailed to me which clearly reflects the forwarding sticker from the U.S. Postal Service. Another copy of the envelope re: the 2/5/01 letter is enclosed.

The representation in appellee's counsel's letter of 3/9/01 that the post office has not been advised to forward mail to my new office is clearly false. The envelope in which appellee's counsel purportedly sent me a copy of its 2/20/01 filings on 2/20/01 clearly lacking a postmark makes it abundantly clear that appellee did not deliver a copy of its 2/20/01 filings to the post office addressed to me that date or any date. Appellee's Certification that it mailed a copy of its 2/20/01 filings to me at my new address is false. The Clerk's docketing the 2/20/01 filings as having been received via mail, as reflected in the dockets we obtained 2/27/01, is false as clearly reflected in appellee's counsel's 2/20/01 letters to the Clerk.

We believe that given the clear fraud being perpetrated by and on behalf of appellee in this matter, that Messrs. Scarpello and Romeo should be disbarred from the Bar of this Honorable Court, that Fox Rothschild O'Brien and Frankel, LLP should be permanently disqualified from practicing before the Bar of this Honorable Court and that appropriate action should be taken as to whomever in the Clerk's Office has assisted appellee herein.

Appendix F

Very truly yours,

s/ Derrick W. Coker
Derrick W. Coker

cc: Scarpello & Romeo, and Waldron
Dr. Kate Osuala

Appendix F

FOX • ROTHSCHILD
O'BRIEN & FRANKEL LLP
ATTORNEYS AT LAW
2000 MARKET STREET
PHILADELPHIA, PA 19103-3291
215-299-2000
FAX 215-299-2150
www.frof.com

John C. Romeo
Direct Dial: (215) 299-2706
Internet Address: jromeo@frof.com

March 9, 2001

VIA HAND DELIVERY
Derrick W. Coker, Esquire
1800 Callowhill Street – 3rd Floor
Philadelphia, PA 19130

Re: Dr. Kate Osuala v. Community College of Philadelphia
No. 00-2463

Dear Mr. Coker:

Enclosed are the copies of the Brief of Appellee and the copy of Appellee's Motion for Leave to File Supplement Appendix and Supplemental Appendix which were inadvertently mailed to your previous address at Suite 202 – Lewis Tower Building, 225 South 15th Street, Philadelphia, PA 19102 on February 20, 2001. Also enclosed

Appendix F

is a copy of the original envelope. Apparently, the post office has not been advised to forward your mail to your new address.

If you have any questions please feel free to contact me.

Very truly yours

s/ John C. Romeo

JCR:nej
Enclosures

Appendix F

FIRST CLASS MAIL
FOX • ROTHSCHILD
O'BRIEN & FRANKEL
TO: Derrick W. Coker, Esquire
Suite 202, Lewis Tower Building
225 So. 15th Street
Philadelphia, PA 19102
J. Scarpello

Appendix F

FOX • ROTHSCHILD
O'BRIEN & FRANKEL LLP
ATTORNEYS AT LAW
2000 MARKET STREET
PHILADELPHIA, PA 19103-3291
215-299-2000
FAX 215-299-2150
www.frof.com

Jeffrey P. Scarpello
Direct Dial: (215) 299-2892
Internet Address: jscrapello@frof.com

February 20, 2001

VIA FIRST CLASS MAIL

Derrick W. Coker, Esquire
Suite 202 – Lewis Tower Building
225 So. 15th Street
Philadelphia, PA 19102

Re: Dr. Kate Osuala v. Community College of Philadelphia
No. 00-2463

Dear Mr. Coker:

Enclosed are two copies of the Brief of Appellee and a copy of Appellee's Motion for Leave to File Supplemental Appendix and Supplemental Appendix filed today with the Clerk OF Court.

Appendix F

Very truly yours,

s/ Jeffrey P. Scarpello
Jeffrey P. Scarpello

JPS/am
Enclosures

Appendix F

FOX • ROTHSCHILD
O'BRIEN & FRANKEL LLP
ATTORNEYS AT LAW
2000 MARKET STREET
PHILADELPHIA, PA 19103-3291
215-299-2000
FAX 215-299-2150
www.frof.com

Jeffrey P. Scarpello
Direct Dial: (215) 299-2892
Internet Address: jscarpello@frof.com

February 20, 2001

VIA MESSENGER

Marcia M. Waldron, Clerk of Court
United States Court of Appeals
for the Third Circuit
U.S. Courthouse
601 Market Street, Room 21400
Philadelphia, PA 19106

Re: Kate Osuala v. Community College of Philadelphia
Civil Action No. 00-2463

Dear Ms. Waldron:

Enclosed for filing is an original and four (4) copies of a motion for leave to file a supplemental appendix in this

matter, as well as, an original and three (3) copies of the supplemental appendix. Kindly date stamp and return the additional copy of the motion.

Sincerely,

s/ Jeffrey P. Scarpello
Jeffrey P. Scarpello

JPS/am
Enclosures
cc: Derrick W. Coker, Esquire (via first class mail)

Appendix F

FOX • ROTHSCHILD
O'BRIEN & FRANKEL LLP
ATTORNEYS AT LAW
2000 MARKET STREET
PHILADELPHIA, PA 19103-3291
215-299-2000
FAX 215-299-2150
www.frof.com

Jeffrey P. Scarpello
Direct Dial: (215) 299-2892
Internet Address: jscarpello@frof.com

February 20, 2001

VIA MESSENGER

Marcia M. Waldron, Clerk of Court
United States Court of Appeals
for the Third Circuit
U.S. Courthouse
601 Market Street, Room 21400
Philadelphia, PA 19106

Re: Kate Osuala v. Community College of Philadelphia
Civil Action No. 00-2463

Dear Ms. Waldron:

Enclosed for filing are an original and ten copies of the brief of appellee in this matter. Please date stamp and return the additional copy.

Appendix F

Sincerely,

s/ Jeffrey P. Scarpello
Jeffrey P. Scarpello

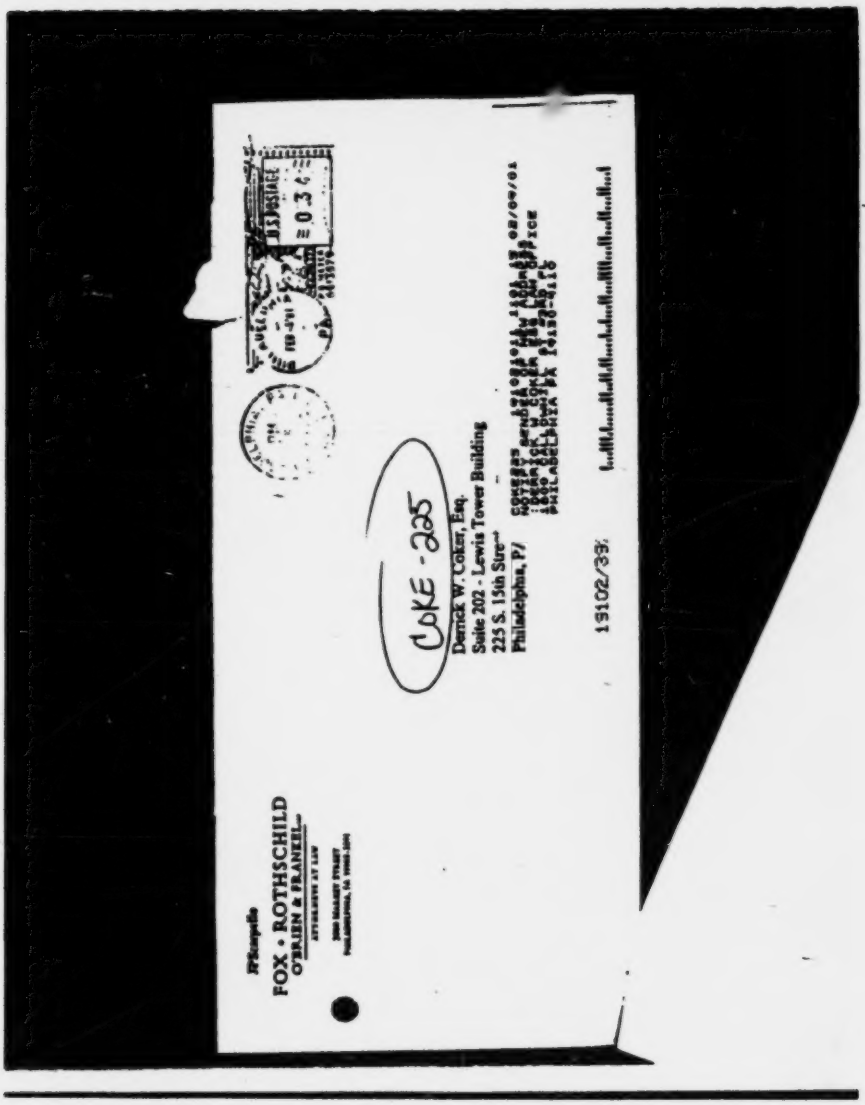
JPS/am
Enclosures
cc: Derrick W. Coker, Esquire (via first class mail)

Appendix F

FIRST CLASS MAIL

MAR 12 2021

Appendix F


FOX • ROTHSCHILD
O'BRIEN & FRANKEL
COKE - 225
Derek W. Coker, Esq.
Suite 202 - Lewis Tower Building
225 S. 15th Stre
Philadelphia, P
19102/33

Appendix F

Law Offices Of
DERRICK W. COKER

Derrick W. Coker, Esq.
(215) 636-0153
(fax) 636-0157

1800 Callowhill Street
3rd Floor
Phila., PA. 19130

Confidentiality Notice

The information in this facsimile transmission intended for the named addressee/recipient(s) only. It may contain information which is privileged, confidential and exempt from disclosure per applicable law. If you are not an agent or employee of the addressee/intended recipient and have received this facsimile transmission in error, you are hereby notified that any dissemination, distributing or copying of this facsimile transmission is strictly prohibited, and, that you must notify us immediately by phone to arrange for the return of this material. Thank you.

Facsimile Cover Sheet

From: *Derrick Coker, Esq.* ph.# *See above.*
Jeffrey P. Scarpello, Esq.
To: *John C. Romeo, Esq.* # faxed to: *215-299-2150*
Osuala v. Comm College
Phila
C.A.3 – Dkt. # 00-2463

Re: *Delivery to Chief Judge* # of pages (incl. cover) *10*
Becker today

Appendix F

Dear Messrs. Scarpello & Romeo:

Following is a copy of the above-referenced, the original of which was hand-delivered today to Chief Judge Becker. Copies of same have also been mailed today.

Thank you for your courtesy and cooperation.

Please call to confirm your receipt, or, to advise as to any amount of pages received other than the number noted above. Thank you.

3/12/01 — s/ Derrick W. Coker
Date — Derrick W. Coker, Esq.

Appendix F

Law Offices Of
DERRICK W. COKER

Derrick W. Coker, Esq.
(215) 636-0153
(*fax*) 636-0157

1800 Callowhill Street
3rd Floor
***Philadelphia, PA.* 19130**

Hon. Edward W. Becker,
Chief Judge
United States Court of Appeals
for the Third Circuit
19613 U.S. Courthouse
601 Market Street
Philadelphia, PA. 19106

March 10, 2001

Via Certified Mail
70001530000629214675

RE: Osuala v. Comm College Phila
Docket No. 00-2463
Appellee's Motion re: Supp. Appendix
District Court's Order of 3/8/01
Motion to Vacate Clerk's Order of 2/20/01
Motion to List for Argument week of 4/2/01 or 4/23/01

Dear Chief Judge Becker:

On behalf of Appellant herein, I respectfully submit for your consideration and action the following as to the instant Appeal.

Before we ever received a copy of the appellee's Motion for Leave to file a Supplemental Appendix, the Clerk — not a judge — issued an Order allowing same and the Supplemental Appendix was filed simultaneously 2/20/01.

Appendix F

We did not receive the Clerk's Order re: same until it was mailed to us 2/23/01 — curiously, the same day that appellee had a copy of its late Brief, said Supplemental Appendix and a copy of its Motion for Leave hand-delivered to us.

Noting that the Motion for Leave in paragraph 4 characterizes its purpose as ". . . and will enable the Court to have benefit of the actual record considered by the trial court in this matter.", the appellee's Motion clearly did not seek merely ministerial relief and was not merely a procedural Motion, but sought to have this Court review its Supplemental Appendix as part of the Court's plenary, substantive review of the action below. After receiving the Appendix 1/18/01, appellee made no attempt to contact us within 10 days or any time before 2/20/01 re: supplementation of the Appendix, and hence should be deemed to have found the Appendix acceptable. Fundamental fairness to Appellant required that Appellant be given the opportunity to respond to said Motion before the Clerk's 2/20/01 Order was issued. Said Order was issued, hence, erroneously and clearly not within the ambit and scope of FRAP 27 and should, we respectfully submit, be Vacated.

Just as the Clerk designated appellee's letter of 2/23/01 as a response to our Motion to Strike, as reflected in the docket as of 2/27/01, ***we are sending a copy of this letter to the Clerk for filing in this matter as our Motion to Vacate the 2/20/01 Order,*** and requesting that the Clerk return a time-stamped copy of same to us in the return envelope we are providing.

Yesterday, we received a letter — not an Order signed by a judge — from the Deputy Clerk that this matter has

been removed from the 4/17/01 Merits list. Since the Calendaring Clerk's Notice of 2/1/01 indicates this matter might alternately (we are paraphrasing) be listed the weeks of 4/2/01 or 4/23/01, we request that this matter, in fact, be listed for one of those 2 weeks. Any delay simply inures to appellee's benefit.

We must question why 2 actions have been taken by the Clerk in this matter rather expeditiously, and our Motion to Strike, etc. filed 2/21/01 remains not acted upon by this Court. Particularly as appellee admits, begrudgingly, that we were not properly served with its Brief within 30 days of 1/18/01, appellee's Brief must be Stricken if the Rules of this Court have meaning and are being applied equally to the parties.

We also received yesterday a faxed Order from the involved district judge. Since the judge has been without jurisdiction since our Notice of Appeal was filed 6½ months ago, we find any involvement of said judge in this matter now, at the least, questionable and believe it to be improper. Whether the Order was intended as threatening, it certainly may be construed as such. Accordingly, we are copying this letter and said Order to the Chief Judge of the U.S. District Court for the Eastern District of Pennsylvania, for whatever action and investigation Chief Judge Giles deems appropriate. A copy of said Order is also attached hereto.

Thank you for your courtesy and cooperation.

Appendix F

Very Truly Yours,

s/ Derrick Coker
Derrick W. Coker

cc: Hon. James T. Giles, Cert. # 70001530000629214682
Chief Judge, U.S.D.C., Ea. Dist. Pa.

Hon. John R. Padova, Cert. # 70001530000629214699
U.S.D.C., Ea. Dist. Pa.

Marcia M. Waldron, Cert. # 70001530000629214705
Clerk of Ct.
U.S. Ct. App. – Third Cir.

Jeffrey P. Scarpello, Esq. Cert. # 70001530000629214712
Fox Rothschild O'Brien & Frankel, LLP.

Dr. Kate Osuala

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 00-98

KATE OSUALA

V.

COMMUNITY COLLEGE OF PHILA.

ORDER

AND NOW, this 8th day of March, 2001, **IT IS HEREBY ORDERED** that:

Defendant's Motion for Attorneys Fees (Doc. No. 67) shall be **HELD IN ABEYANCE PENDING APPEAL.**

BY THE COURT:

s/ John R. Padova
JOHN R. PADOVA, J.

Appendix F

2:00-cv-00098

DERRICK W. COKER, Esq. gmk
LAW OFFICES OF DERRICK W. COKER
1800 CALLOWHILL STREET
3RD FLOOR
PHILADELPHIA, PA 19130-4110 FAX 215-636-0157

Appendix F

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA PA 19106-1790
Website: pacer.ca3.uscourts.gov

MARCIA M. WALDRON
CLERK

TELEPHONE
215-597-2995

March 8, 2001

Derrick W. Coker, Esq.
Jeffrey P. Scarpello, Esq.

Re: Kate Osuala, Dr., Appellant v. Community College of Philadelphia
No. 00-2463

Dear Counsel:

At the direction of the Court, please be advised that the above-captioned case has been removed from the merits list for **Tuesday, April 17, 2001.** You will be advised at a later date as to when this case will be re-listed.

Very truly yours,
MARCIA M. WALDRON,
Clerk

s/ Lizette Martinez
Lizette Martinez
Deputy Clerk
Direct Dial: (267) 299-4914

MMW:lm

Appendix F

Derrick W. Coker, Esq.
1800 Callowhill Street
3rd Floor
Philadelphia, PA 19130

APPENDIX G — *LEGAL INTELLIGENCER* ARTICLE REGARDING THIRD CIRCUIT'S CONNECTION TO THE DEFENSE FIRM

THE LEGAL INTELLIGENCER

PHILADELPHIA, FRIDAY, NOVEMBER 3, 2000

FOX'S KEVIN CAREY APPOINTED TO BANKRUPTCY BENCH

BY SHANNON P. DUFFY
U.S. Courthouse Correspondent

To fill the vacancy created when former U.S. Bankruptcy Judge David A. Scholl was denied re-appointment, the judges of the 3rd U.S. Circuit Court of Appeals have voted to appoint attorney Kevin J. Carey of Fox Rothschild O'Brien & Frankel, a longtime columnist for this newspaper, to the post.

Also winning a seat from the 3rd Circuit yesterday was attorney Donald H. Steckroth of Gibbons Del Deo Dolan Griffinger & Vecchione, who was appointed to a post as bankruptcy judge for the District of New Jersey.

Both Carey's and Steckroth's five days on the bench could still be several months away, however, since the court allows for a public complaint period and because all new federal judges must undergo an extensive background check by the FBI.

Chief U.S. Circuit Judge Edward R. Becker had recused himself from voting on Carey's appointment because Becker's brother-in-law, attorney Louis W. Fryman, heads

Fox Rothschild. As a result, Becker said he could not comment on the court's decision.

Carey, too, was mum, saying he would rather not comment before the appointment is truly official. Due to the late hour of the court's announcement, Fryman also could not be reached for comment.

But attorney David Sykes of Duane Morris & Heckscher, who served on the search committee that made recommendations to the 3rd Circuit, said he considered Carey "a great choice" due to his extensive experience and "even temper."

Sykes said the committee, which was headed by attorney Michael Reed of Pepper Hamilton, was forced to choose from a pool of highly qualified candidates for the job.

In the end, Sykes said, the committee found that two of the candidates were "outstanding," while six others were "great."

Sykes declined to identify any of the other leading candidates. Reed could not be reached for comment.

Carey is a 1979 graduate of Villanova Law School, having earned his bachelor's degree at Pennsylvania State University.

He began his legal career as a law clerk to U.S. Bankruptcy Judge Thomas M. Twardowski and then served as clerk of court of the Bankruptcy Court for the Eastern District of Pennsylvania.

Appendix G

A former member of Mesirov Gelman Jaffe Cramer & Jamieson, where he served as chair of the firm's bankruptcy and creditors' rights group, Carey is very well known among bankruptcy lawyers due to his weekly "Bankruptcy Update" column in *The Legal Intelligencer*, which he co-authors with Marvin Krasny of Wolf Block Schorr & Solis-Cohen.

At his interview with the 3rd Circuit judges, one judge asked Carey if he would continue to write his column in *The Legal* and include criticisms of his own opinions. Carey said that he would not, but that he was sure that Krasny would not hesitate to criticize Carey once he joined the bench.

In his practice, Carey represents financial institutions, corporate creditors, landlords and debtors in bankruptcy and workout situations. He also represents lenders and borrowers in structuring and documenting asset-based, leasing, equipment, inventory, real estate and securitization financings.

Carey is a co-author of the bankruptcy chapter of *Key Shopping Center Legal Issues* and is a member of the editorial boards of *Commercial Leasing Law & Strategy* and *The Legal Intelligencer*.

STECKROTH

Steckroth has been a partner at Gibbons Del Deo since 1979. He specializes in insolvency law with an emphasis on corporate reorganization, informal debt restructuring, secured party representation, and he heads the firm's workout and secured creditor section.

Appendix G

A 1972 graduate of the Seton Hall University Law School, Steckroth also holds an undergraduate degree in accounting from Seton Hall and has authored articles and lectured at national and local seminars concentrating on bankruptcy, workout and secured transaction matters.

He is currently chair of the New Jersey Supreme Court Committee on Character, responsible for reviewing all out-of-state candidates for admission to the New Jersey Bar.

APPENDIX H — ACADEMIC FREEDOM SECTION OF COLLECTIVE BARGAINING AGREEMENT, WITH APPELLANT'S MAIN BRIEF AND REPLY BRIEF SUBMITTED TO THE COURT OF APPEALS JANUARY 18, 2001 AND MARCH 4, 2001 (MARCH 7, 2001)

CCP

FULL-TIME FACULTY

COLLECTIVE BARGAINING AGREEMENT

By and Between

COMMUNITY COLLEGE OF PHILADELPHIA

And

THE FACULTY FEDERATION OF THE COMMUNITY COLLEGE OF PHILADELPHIA LOCAL 2026, of the AMERICAN FEDERATION OF TEACHERS, AFL-CIO

September 1, 1990 to August 31, 1995

FFCCP

* * *

Appendix H

ARTICLE XV
ACADEMIC FREEDOM

It is recognized that in a world of rapid change and recurrent crises, a college best serves its community not as a stronghold of rigid tradition but as an open intellectual forum where varying shades of opinion may be freely expressed and fairly debated. Positive values evolve from a free exchange of ideas among broadly informed citizens, and the progressive evolution of American institutions may depend upon their quality of flexibility in meeting changing social and economic needs. The American democratic way of life is strong enough to stand on its own merits, and substantial enough to survive criticism or comparison with that of any other system.

Board subscribes to the following statement on Academic Freedom:

(1) Any Employee is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his/her other employment duties.

(2) Any Employee is entitled to freedom of discussion in the classroom, provided the discussion is relevant to the course.

(3) The college or university Employee is a citizen, a member of a learned profession, and an officer of an educational institution. When an Employee speaks or writes as a citizen, or

exercises his/her legal or constitutional rights, said Employee shall be free from institutional censorship or discipline. However, in his/her extramural utterances s/he has an obligation not to permit the implication that s/he is an institutional spokesman.

(4) There shall be no censorship of library collections.

Anything herein to the contrary notwithstanding, a violation of Academic Freedom may give rise to a grievance which may be pursued through all levels of Article XXII, Grievance Procedure.

* * *

Appendix H

NO. 00-2463

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DR. KATE OSUALA,

Appellant

V.

COMMUNITY COLLEGE OF PHILADELPHIA,

Appellee

Appellant's Brief in Support of her appeal and reversal of the decision of the U.S.D.C., Ea. Dist. of Pa. to extinguish her Title VII case, its denial of her Motion to Amend her Complaint and its refusal to enforce F.R.C.P. 26.

Respectfully Submitted,
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[Tables of Cases/Authorities/Contents omitted from Appendix]

Appendix H

Corporate Disclosure Statement

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Dr. Kate Osuala makes the following disclosure:

1) No non-governmental corporate party has any interest in this matter nor does she have any connection with any such entity nor is she any such non-governmental corporate party;

2) She does not hold 10% or more (or any %) of the stock of any such entity/party referenced in # 1 above;

3) No publicly held corporation which is not a party before this Court has any financial interest in the outcome of this proceeding;

4) The instant matter is not a bankruptcy proceeding nor is she involved in any bankruptcy proceeding.

s/ Derrick Coker Dated: 1/18/01
(Signature of Counsel or Party)

* * *

Appendix H

Statement of Appellate Jurisdiction

The Courts of Appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. The final decision herein appealed 8/21/00, was filed 8/15/00, granting appellee's Motion for Summary Judgment extinguishing Appellant's Title VII suit alleging national origin/race discrimination, disparate treatment and retaliation, contrary to F.R.C.P. 56(b), and wherein the district court misstates the law, and; the district court's orders denying amendment of the complaint and denying discovery required under F.R.C.P. 26(a)(1)(B), (b)(1), interlocutory during the pendency of the suit, then became final, appealable orders upon grant of the Rule 56(b) Motion. 28 U.S.C. Section 1291.

Statement of Subject Matter Jurisdiction

The Court of Appeals has subject matter jurisdiction of any appeal from a final decision of a district court involving causes of action arising under the laws of the United States pursuant to 28 U.S.C. Sections 1331 and 1343. F.R.A.P. 3(a)(1). The laws herein involved being 42 U.S.C. Section 2000e-5(f)(3) (and if amended, also 42 U.S.C. Section 1983 and 43 P.S. Section 955). The decision herein appealed was filed 8/15/00 and the instant Appeal was timely filed 8/21/00.

Statement of Issues

1. The district court committed reversible error granting the Rule 56(b) Motion, genuine issues of material fact being raised below.

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2. The district court committed reversible error by misstating the law and the record as to Appellant's prima facie case and abused its discretion refusing to apply Supreme Court and 3rd Circuit precedent.

3. The district court abused its discretion denying amendment of Appellant's Complaint in light of after-acquired evidence.

4. The district court abused its discretion refusing to enforce F.R.C.P. 26(a)(1)(B), (b)(1) and barring discovery sought by Appellant.

Statement of the Case

The res of this Title VII matter is Dr. Kate Osuala's victimization by discriminatory, disparate and retaliatory treatment and firing because of her national origin and race. She presented a prima facie case under *Reeves v. Sanderson Plumbing Products* and 3rd Circuit precedent, and the court below abused its discretion ignoring this precedent, not allowing the F.R.C.P. 15 Motion & not enforcing F.R.C.P. 26(a)(1)(B), (b)(1).

Statement of Facts

Dr. Kate Osuala was an Assistant Professor/Librarian, Rank 6, at appellee from April 1994 – March 1998. Her suit alleges discriminatory, disparate, retaliatory treatment in the terms & conditions of her employment due to her national origin & race. Before she complained, she enjoyed good raises, contract renewal 3 successive years, was deemed an

asset, earned $49,000/yr. and she conducted herself consistent with her Ibo heritage and strict sense of chain-of-command and belief she had the same free speech rights as others. After complaining, she was retaliated against, paid less than other Ph.D. faculty of appellee and fired before tenure, for pretextual reasons (rude, obnoxious, insubordinate speech — not for performance) for which American-born Librarians were neither fired nor disciplined, the Collective Bargaining Agreement barring discipline of faculty for speech. She presented ample evidence below for a jury to find the proferred reasons for her firing pretextual and impose liability against appellee. The court erred denying amendment of her complaint and ignoring/refusing to enforce F.R.C.P. 26.

Statement of Related Cases or Proceedings: None.

Statement of the Standard or Scope of Review

The Court of Appeals exercises plenary review over a grant of summary judgment to determine whether plaintiff presented a prima facie case and evidence adequate for a jury to reject the employer's explanation and find liability, and, when the court misstates the law. *Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 148 (3rd Cir. 1993).

Summary of the Argument

The district court committed clear, reversible error granting the defendant's Rule 56(b) Motion as ample genuine issues of material fact were presented below for resolution

by the jury under *Reeves*. It committed clear reversible error usurping the jury's role to evaluate whether appellee's reasons for firing Dr. Osuala are pretext, having found "the parties agree" on the 1st 3 prongs of Appellant's prima facie case then abusing its discretion by ignoring her substantial evidence on prong 4. The court clearly abused its discretion re: amendment of the Complaint and refusing enforcement of F.R.C.P. 26., prejudicing Appellant's rights.

Argument:

1. *The District Court may not grant a Rule 56(b) Motion when genuine issues of material fact exist.*

The court below misstates the factual record and misstates the law in reaching its reversible decision below.[1] *Exercising plenary review*, the 3rd Circuit may reasonably and easily infer same from the district court's refusal to approve the Statement of the Evidence or Proceedings[1a] notwithstanding its obligation to do so per Federal Rule of Appellate Procedure 10(c). Moreover, the district court's misstatement of the factual record and misstatement of the law in its Memorandum Decision belie its predisposition in appellee's favor and its abuse of discretion in refusing to follow U.S. Supreme Court precedent and precedent from the instant appellate court which precedent, applied to the facts of this case, require reversal of the district court in this case.

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1. The instant appeal, of course, does not challenge the district court's rulings on the waiver or issue preclusion issues, the court correctly deciding those issues against appellee. There is no cross-appeal, so those issues are not before this court.

1a. A., Vol. 1, p. 000021.

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Comparing the Statement of the Evidence or Proceedings with the district court's Memorandum, this Honorable appellate court will note that appellee presented neither affidavits nor depositions upon which the district court could rely in its determination that appellant somehow failed to make out her prima facie case.[2] Moreover, this comparison coupled with a review of the evidence actually submitted by appellant below will establish that genuine issues of material fact were raised below, and evidence was presented to establish pretext, and hence, the district court must be reversed.

Appellant, Dr. Kate Osuala, was an Assistant Professor/ Librarian Rank 6. She is a black Nigerian immigrant. She was the only Ph.D. employed in appellee's Library from April 1994 – March 1998. She — not the white Librarians — facilitated relocation of the Library's 800,000 plus collection, without provision of a mover, at least 5 times during that period. Dr. Osuala taught, assisted faculty, students and staff, etc., and her service to the Library enabled it to get Middle States Certification which it lacked before she was hired. Dr. Osuala, unlike her white colleagues in the Library, was

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2. The district court was presented with neither affidavit nor deposition of any black female librarian to confirm that Appellant's duties were assumed by any such person. Appellant's Answer to the Rule 56 Motion states she was replaced by 2 white females. The court states it reviewed the depositions (A.-Vol. 1, p. 000018). This genuine issue of material fact for the jury warrants reversal under Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. __, 147 L.Ed. 2d 105, 120 S.Ct. (2000), as the district court may not weigh this evidence but must allow the jury to assess whether appellee's reasons for firing her were not bona fide but pretextual. *Reeves*, supra, precludes the district court from weighing the evidence.

actively sought by faculty and students and praised by both and was deemed an asset in the Library. Before her complaints about discrimination and disparate treatment, she enjoyed good raises and garnered praise from the Library director. Notably, her official personnel file — as indicated under oath by her immediate supervisors — bore no negative material nor performance reviews, until after she raised Title VII-based complaints.[3]

Notably, Defendant decries Appellant as causing problems and being the subject of alleged complaints of "rude, obnoxious and insubordinate behavior" throughout the College, without specifically quantifying same in its Rule 56 Motion.[4] Yet, wholly inconsistent with said allegations, appellee renewed Dr. Osuala's contract each academic year 1994-1997, consistent with her claim that she suffered adverse employment decisions only after she began to complain about discrimination and disparate treatment, and then appellee fired her 2/12/98 before she would have been eligible for tenure on 9/1/98.

Appellant presented below depositions of Rev. Gloria Ware, Kenneth Martin, Gary Grissom, Jack Muraskin,

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3. Re: testimony of Appellant's supervisors, parts of Exh. 4, 6 of Appellant's Answer to appellee's Rule 56 Motion, see A.-Vol. 2, p. 000171, 0000185-189, 000199-200, 000207-212, 000220-224 (Johnson) and p. 000305, 000337-344 (Fedorijczuk). Plaintiff's Answer to the Rule 56 Motion, in its entirety, is set forth in the Appendix, Vol. 2. Because of binding limits, Vol. 2 may be in 2 subparts.

4. The Rule 56 Motion does not quantify this hearsay, nor does the court;

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Rick Bojar, other excerpts as cited by the court below, together with memoranda from Johnson and Fedorijczuk focusing on appellant's national original and secretly rejecting "Know Africa Books", the pertinent Unemployment Compensation decisions, an "Arbitration Results" article by Bojar, her personnel file, the Collective Bargaining Agreement, and W-2's.[4a]

The district court obviously misstates the evidence before it in its Memorandum granting appellee's Rule 56 motion, as it makes no mention of having had Appellant's above-cited evidence before it. Notably, the court below states that "the parties agree" on appellant's satisfaction of the first three prongs of her prima facie case, but cites nothing in appellee's Rule 56 Motion to support this statement. This is because appellee's Motion makes no such concession. Rather, any such concession is in appellee's Proposed Jury Instructions, filed long after the Rule 56 Motion had filed and answered.[5]

The district court then recognizes that a genuine issue of material fact is presented on the 4th prong of appellant's prima facie case, but then it impermissibly usurps the

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4a. see fn. 3 and A.-Vol. 2, pp. 000073, 75, 352, 362(Ware), 399(Martin), 432(Grissom), 450(Muraskin), 480, 530(Bojar), 546(U.C.), 552 (W-2's).

5. Our F.R.A.P. 10(c) Statement outlines all of the evidence presented below; see A.-000021. See also pertinent docket entries, A.-000038. The referenced Proposed Jury Instructions are found in A.-Vol.3, p.000626-000660. Pages 000611, 618, 661, 696, 703 and 746, cover letters inadvertently numbered, have been omitted.

province of the jury, acting as advocate for the appellee and accepting its hearsay on this issue instead of Appellant's averment that 2 white Librarians replaced her. Appellee presented neither deposition testimony nor affidavit as to this issue. Moreover, noting that appellee claims in discovery responses that it cannot identify its employees' ethnicity, then Muraskin does make such identifications in his deposition presented below,[6] the unsworn claim by appellee that Appellant's duties were taken over by another black not only lacks any indicia of reliability but also must and should have been left for the jury to evaluate. Yet, the district court ignored its duty and obligation to leave this genuine issue of material fact for the jury to evaluate and resolve, despite this duty and obligation being spelled out by the U.S. Supreme Court 2 months before the court below granted the appellee's Rule 56 Motion. See, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. __, 147 L.Ed. 2d 105, 118-124, 120 S.Ct. __ (2000). See also, *Goosby v. Johnson and Johnson Medical, Inc.*, 228 F.3d 313 (3rd Cir. 2000). *Reeves*, supra, clearly precludes the district court from usurping the jury's role in evaluating the evidence presented below as to whether Appellant was replaced by someone outside her protected class. Since clearly this makes out the 4th prong, the court below indeed committed reversible error, under *Reeves*. This genuine issue of material fact clearly must be evaluated by a jury together with its evaluation of all of the other evidence, so that it may determine whether appellee's proferred reasons for firing Appellant are pretextual for its real discrimination, disparate treatment and retaliation against her.

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6. A.-Vol. 2, p. 000457-00461.

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Curiously, the court below also ignores precedent from this Honorable appellate court that makes clear that it is not always necessary for a plaintiff to make out the 4th prong of her/his prima facie case, and that the district courts are to apply a case-by-case analysis in determining whether a plaintiff has nonetheless made out a prima facie case on less than the 4 prongs. See, *Jackson v. University of Pittsburgh*, 826 F.2d 230 (3rd Cir. 1987); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933 (3rd Cir. 1997); *Olson v. General Electric Astrospace*, 101 F.3d 947 (3rd Cir. 1996).

Of course, the issue of whether Appellant was replaced by individuals outside of her protected class was not the only genuine issue of material fact upon which Appellant presented evidence below. The district court claims it reviewed the depositions presented, but crafts its Memorandum to give the false impression that the only evidence presented by Appellant were excerpts from her 2 supervisors' Arbitration testimony and from Dr. Williams' 6/14/00 deposition and W-2's of the Library personnel. For reasons we may only speculate about, the court below ignores and makes no mention of the sworn, videotaped testimony of Rev./Professor Gloria Ware and Professor Kenneth Martin, who testified that "rude, obnoxious and insubordinate behavior" of white faculty of appellee is regularly and historically tolerated by appellee and the tenure of such white faculty is not prematurely terminated due to such behavior, and, their belief that Dr. Osuala's Ibo heritage and her adherence to same made her the target of adverse employment actions/decisions from her supervisors and appellee while white faculty had no such actions taken

against them for the same behavior.[7] The court below also ignores the testimony presented from Bojar, that no other faculty were terminated for essentially speech, and the testimony of Muraskin and Bojar that though Appellant was allegedly the subject of student complaints, the African American (i.e. American-born black as opposed to naturalized African or West Indian immigrant) male Vice President of appellee responsible for Student Affairs was not involved by Muraskin, Johnson or Fedorijczuk — all white decisionmakers vis a vie Appellant — in investigation of any alleged student complaints against Appellant.[8] The district court also ignores and does not state in its Memorandum that Dr. Williams, acting President when Dr. Osuala was fired, testified 6/14/00 that had he known that appellee sought to have students make false complaints against Dr. Osuala, and in light of other Librarians' report to him that other Librarians also engaged in rude, obnoxious and insubordinate behavior without penalty and that the immaturity of the head of the Library was the problem as opposed to anything said or done by Appellant, then Dr. Williams "didn't know" if he might have made a different decision re: his signing off on Appellant's firing.[9] And then, only the 3 white decisionmakers at appellee would have been involved in the adverse actions against her. The appellee relied upon the testimony of one of these decision makers,

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7. A.-Vol. 2, p. 000362-381(Ware), p. 000399-420, 426-428 (Martin).

8. A.-Vol. 2, pp. 000485-487, 491-492 (Bojar), 459-460 (Muraskin);

9. A., Vol. 2, pp. 000249, 265-286, 288-300.

Fedorijczuk, in opposing Appellant's claim for Unemployment Compensation, and the Unemployment Compensation authorities found that appellee failed to meet its burden of proving insubordination.[10] By ignoring this evidence, again, the district court, wholly contrary to *Reeves* usurped the function of the jury to evaluate the proferred reasons for firing Dr. Osuala and to determine whether they should be rejected as pretextual. The testimony of Rev./Professor Gloria Ware, of Professor Kenneth Martin, of Muraskin and Bojar, and of Appellant raise genuine issues of material fact as to whether her alleged "behavior" was intolerable from her, because she is a black Ibo adhering to her cultural upbringing and background, but tolerable from white faculty, and again, *Reeves* prohibits the district court from usurping the jury's province and duty to evaluate same.

Evaluating the testimony of the witnesses listed above & identified in Appellant's Pretrial Memorandum,[11] a jury may believe Dr. Osuala and *impose liability against Appellee*, finding Dr. Osuala's claims credible re: disparate treatment and retaliation for protected activity: complaining and filing charges with the appropriate local, state and federal authorities when she could endure such treatment no further. The jury will glean from Grissom's testimony and racial classification data produced in discovery that the faculty of appellee is overwhelmingly white;[12] it will also glean from

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10. A.-Vol. 2, pp. 000546-550;

11. A.-Vol. 3, pp. 000662, 666-668.

12. A.-Vol. 2, p. 000432, 437-447, A.-Vol. 3, pp. 000717-730, 756-757;

Bojar, Muraskin, Ware, Martin, Dr. Williams, Appellant and other witnesses' testimony that appellee completely ignored the Free Speech rights of Appellant, both as provided under the U.S. Constitution and as specifically provided under the Collective Bargaining Agreement which forbids a faculty member from being disciplined for speech and that the appellee targeted Dr. Osuala for adverse employment actions because she conducted herself and spoke in adherence with her Ibo heritage and Nigerian upbringing and training and was a black outperforming her colleagues in the Library,[13] as opposed to placing credence in the pretextual reasons proferred by appellee. As such, ample genuine issues of material fact were presented below, warranting *reversal.*

> 2. *The District Court committed reversible error and an abuse of discretion in refusing to evaluate appellant's prima facie case pursuant to recent U.S. Supreme Court precedent and pertinent precedent from the Third Circuit.*

The 3rd Circuit's review on this issue is plenary. Appellant herein incorporates by reference the preceding section of her Argument as if same were more fully set forth herein at length. By way of further argument on this issue, the court below cites 5 cases purportedly supporting its decision as to whether Appellant established her prima facie case below. The instant case is not one wherein Appellant relies solely upon a "stray remark" about some nationality

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13. The Collective Bargaining Agreement is in A.-Vol. 2, pp. 000133, with Free Speech discussed in Art. XV at pp. 000155-156;

13. see fn. 4a and fns. 6-12.

other than hers; nor is it a case where she seeks comparison to clerks as opposed to faculty; nor is hers an age discrimination nor sexual harassment case. The court below, hence, misplaces its reliance upon those 5 cases, as part of its improper refusal to follow *Reeves*, *Olson*, *Matczak* and *Jackson* cited in the preceding section of Appellant's Argument.

Particularly disturbing is the district court's abuse of discretion in its refusal to follow controlling U.S. Supreme Court and 3rd Circuit precedent as to the quantum of evidence necessary for appellant to make out a prima facie case of discrimination, just enough evidence sufficient for a jury to disbelieve appellee's proferred reasons for its actions. Noting that *Reeves* was "the law of the land" 2 months before the court below decided appellee's Rule 56 Motion, and was cited to the district court in Appellant's Proposed Jury Instructions which were sent to the court below nearly 1 month before it decided appellee's Motion,[14] it committed reversible error failing to follow *Reeves*; see *Small v. Lehman* 98 F.3d 762, 768 (3rd Cir. 1996).

The district court seems to suggest that some of the cases it relied upon hold that in addition to making out a prima facie case of discrimination and/or disparate treatment, Appellant must then make out a 2nd prima facie case of retaliation. But, those cases use no language nor state holdings that Appellant must make out a 2nd prima facie case of retaliation after establishing a prima facie case of discrimination/disparate treatment, as the elements of a

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14. see fn. 5.

retaliation claim are substantially identical to/subsumed by/ into the 1st 3 prongs of a prima facie case of *discrimination*. Since the court below states that the parties agree on Appellant's establishment of the 1st 3 prongs of the prima facie case of discrimination, the court below's later assertion that Appellant somehow failed to establish the elements of retaliation is unsupported by the actual record before the district court — the scope and breadth of which, again, the court misstates in its Memorandum.

Appellant's supervisors, again, admitted her official Personnel file bore no negative material until after she complained about discrimination and disparate treatment. Moreover, the evidence presented to Dr. Williams that other Librarians were undisciplined for alleged rude, obnoxious and insubordinate speech[15] while Dr. Osuala was fired for same after complaining about discrimination and disparate treatment, may lead a reasonable jury to find the elements of retaliation have been established. *Reeves* and *Small*, supra, make clear that the district court is not free to ignore the "law of the land" nor evidence *presented to it when deciding a Rule 56(b) Motion and it especially may not* ignore or disregard critical evidence favorable to the fired employee. Moreover, under Reeves, the district court is not only required to review all of the evidence presented, it may not

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15. Appellee's white professors who are rude, obnoxious and insubordinate are viewed as "take charge", "take no nonsense", "candid", "gutsy", etc., and get promoted inspite of such speech/ behavior; see fn. 9; also, see fn.7. Appellant "took charge", was "gutsy", spoke "candidly", followed a strict sense of chain-of-command rooted in her culture, and was retaliated against and fired.

make credibility determinations or weigh the evidence as such is the province of the jury.

Appellant presented ample evidence below to make out a prima facie case under *Reeves*, *Olson*, *Matczak* and *Jackson*, and the district court committed clear reversible error, applying those cases, *Goosby* and *Small*.

3. *The District Court abused its discretion in its denial of Appellant's Motion to Amend the Complaint.*

The review here is to determine prejudice to Appellant's substantial rights. Appellant sought to amend her Complaint, per F.R.C.P. 15, to add as additional defendants the white decisionmakers (Johnson, Fedorijczuk, Bojar and Muraskin) involved in her firing, as parties liable to her for damages per 42 U.S.C. Section 1983 and per 43 P.S. Section 955(d), and for ongoing retaliatory action against Appellant after her firing which action was concealed during discovery but which evidence was presented in Appellant's Answer to the Rule 56 Motion. The court held no on-the-record hearing as to Appellant's Motion to Amend.[16]

This issue was not litigated by the parties during the Arbitration, for if it were, reference to same would appear in appellee's Rule 56 Motion and in the district court's Memorandum and there is no such reference in either. The individuals sought to be joined are not immune as employees

16. The only on-the-record hearing was 7/24/00, see A.-Vol.3, p. 000798;

of appellee pursuant to *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978) nor pursuant to *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). The "Arbitration Results" article clearly reads as a postemployment action by appellee to "warn" others against Dr. Osuala. Noting its publication in a medium with circulation beyond appellee, (just as publication of the court below's Memorandum on the Internet gives its Decision national circulation, which in turn produced calls to counsel for comment from around the country), and Appellant's 5/1/00 deposition,[16a] the ongoing retaliatory nature of the article is self-evident. The court's refusal to grant the Motion to Amend was error.

4. *The District Court Abused its Discretion in its Refusal to Enforce F.R.C.P. 26(a)(1)(B), (b)(1).*

The 3rd Circuit reviews here for prejudice to Appellant's substantial rights. Appellant's Complaint includes averments that after she complained about discriminatory, disparate and retaliatory treatment, she was paid less than similarly situated Ph.D.'s employed by appellee during the years she was employed there. Federal Rule of Civil Procedure 26 mandates, in clear, unambiguous terms, that ". . . a party shall, without awaiting a discovery request, provide to the other parties: . . . a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are relevant to disputed facts alleged with particularity in the pleadings

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16a. A.-Vol.3, p. 000780-797 and A.-Vol. 2, pp. 000531-532 and the discussion of issues 1 and 2 above, re:the policy practiced to subvert Appellant's First Amend. rights while the "rude, obnoxious, insubordinate" behavior and speech of whites wasn't.

. . . . whether it relates to the claim or defense of the party seeking discovery. . . .". F.R.C.P. 26 (a)(1)(B), (b)(1).

Appellant sought the W-2's of the other Ph.D.'s employed by appellee at the same time that she was employed by appellee (and she produced a list of said Ph.D.'s names), as such W-2's would be the best evidence as to her claim that after she complained of discriminatory and disparate treatment she was paid less than similarly situated employees of appellee.[17] The district court abused its discretion in refusing to enforce Rule 26, particularly as the W-2's are exclusively in appellee's custody and control and are directly relevant to and are indispensable to this claim. Indeed, in its Motion for Protective Order, appellee concedes that production of these W-2's "would harm" it,[18] which must mean it employs Ph.D.'s similarly situated to Appellant. But then, the district court unilaterally changed the scope of Appellant's discovery request and accepted appellee's false representation that it had no W-2's for such Ph.D.'s.[19] No district court, including the one below, has the authority to refuse to enforce the cited Rule, and the refusal here is clearly reversible error.

CONCLUSION:

The district court erroneously granted appellee's Rule 56(b) Motion as there are ample genuine issues of material

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17. Appellant's pertinent discovery requests are found at A.-Vol. 3, p. 000697-704;

18. Appellee's pertinent discovery responses are found at A.-Vol. 3, p. 000745-779 and 000817-821;

19. The involved Orders are found at A.-Vol. 1, p. 000034-000037;

fact for resolution by a jury in this case. The district court misstated and misapplied the controlling law as to Appellant's establishment of her prima facie case and as to the elements of her retaliation claim below, ample evidence having been presented as to both and from which a jury may infer pretext and impose liability on appellee. The district court abused its discretion refusing to allow the amendment of the Complaint[20] and in its refusal to enforce F.R.C.P. 26 and hence committed reversible error.

WHEREFORE, Appellant respectfully moves for Reversal and Remand for jury trial, with amendment to the Complaint allowed and appellee ordered to produce the W-2's of its other Ph.D.'s.

Respectfully Submitted,
DERRICK W. COKER, ESQUIRE

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1/18/01
Date

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20. A.-Vol. 3, pp. 000675-686.

Appendix H

Certification of Bar Membership

I, Derrick W. Coker, Esquire, hereby certify that I am a member of the Bar of this Honorable United States Court of Appeals for the Third Circuit, having been admitted as an Attorney and Counselor of same on the 30th day of May, one thousand nine hundred and ninety, pursuant to 3rd Cir. LAR 46.1.

1/18/01
Date

s/ Derrick W. Coker
Derrick W. Coker, Esquire

Certificate of Service

I, Derrick W. Coker, Esq. hereby Certify that I personally hand-delivered a true and correct copy of Appellant's Brief and Appendix addressed to the below-listed opposing counsel at the address for his office indicated below on the 18th day of January, 2001:

Jeffrey P. Scarpello, Esquire
FOX ROTHSCHILD O'BRIEN & FRANKEL
2000 Market Street
Philadelphia, PA. 19103

1/18/01
Date

s/ Derrick W. Coker
Derrick W. Coker, Esq.

Appendix H

NO. 00-2463

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DR. KATE OSUALA,

Appellant

V.

COMMUNITY COLLEGE OF PHILADELPHIA,

Appellee

Appellant's Reply Brief in Support of her appeal and reversal of the U.S.D.C., Ea. Dist. of Pa. to extinguish her Title VII case, its denial of her Motion to Amend her Complaint and its refusal to enforce F.R.C.P. 26.

Respectfully Submitted,
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[Tables of Cases/Authorities/Contents omitted from Appendix]

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Without waiving her Motion to Strike appellee's Brief, Supplemental Appendix and to bar appellee from Oral Argument, said Motion still outstanding, Appellant files the instant Reply Brief to preserve the record, arguing as follows:

(A) Appellee's Brief is wholly unresponsive to Appellant's Brief and fails to support the Decision below.

The purported "Counter-Statement of Facts" of appellee — nearly 1/3 of its Brief — warrants neither consideration by nor credence from this Court. Were these "accusers" credible before a court of law, appellee would have called them as witnesses and subjected them to cross-examination in the instant Title VII matter — which appellee did not do. This Honorable Court must recall what is already noted in Appellant's Main Brief. (1) Appellee took only 2 depositions in Appellant's Title VII action (the testimony referred to by the district court is from the Arbitration) — Appellant's and Dr. Williams, and sabotaged the depositions of Dr. Osuala's supervisors in this Title VII case (A-Vol. 2(b), p. 000354-360). (2) The district court's Decision (A-000001-000019) specifically indicates the district court only reviewed testimony of Appellant's supervisors and Dr. Williams, hence appellee's reliance upon the hearsay in its Counter-Statement of Facts has no foundation in the actual Decision below. (3) The district court ruled against appellee on the issue of whether the Arbitration disposed of Appellant's Title VII claims and, having not filed a cross-appeal, appellee may not replow that field, it is simply barren. (4) The hearsay in the Counter Statement of Facts is excludable by a court of law pursuant to FRE 402-404. (5) Dr. Williams, appellee's

witness in this Title VII case, stated that had he known students were pressured to lie about Appellant, he "didn't know" if that would changed his mind about signing off on Appellant's firing (Main Brief, p. 18). (6) Had the supervisors been allowed to testify sequestered, they would have been forced to admit that in their Arbitration testimony they *admitted* that Appellant's official Personnel file bore no negative references until after she complained of discriminatory, disparate and retaliatory treatment (Main Brief, p. 12). The Counter-Statement of Facts is illustrative of the appellee's pretextual defense. Appellant was not fired in 1994, 1995, 1996 or 1997; these false accusations hence lack merit or weight. In an educational setting, there "is no question" that the Appellant's speech gets equal protection to that of white librarians / employees. *Saxe v. State College Area School District*, __ F.3d __ (3rd Cir. 2001). Dr. Osuala was only targeted for firing after she complained, 5 months before her tenure!

(B) Appellee's Brief wholly fails to buttress the district court's erroneous finding as to the prima facie case.

Recognizing that direct evidence of discrimination is often difficult for Title VII plaintiffs to produce, the U.S. Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* (see the Table of Cases and Authorities for all pertinent initial citations) changed the law. Under *Reeves* plaintiff is required to present just enough evidence to give rise to an inference of discrimination and to show that defendant's reasons for the adverse employment action are pretextual, in turn giving rise to an inference of liability. 120 S. Ct. at 2106. *Reeves* also *removes any discretion from the district*

court re: its review of the evidence under a Rule 56 Motion. Under *Reeves*, the district court *may not* make credibility determinations re: the evidence, *must* draw all reasonable inferences in favor of the nonmoving party, and *must disregard* all evidence favor to the moving party (the above-referenced hearsay/excludable allegation per FRE 402-404) that a jury is not required to believe. 120 S. Ct. at 2110.

Moreover, *Reeves* is the natural and logical progression of the law as articulated by this Honorable Court in *Jackson v. University of Pittsburgh*, *Matczak v. Frankford Candy and Chocolate Co.*, and *Olson v. General Electric Aerospace*. Of course, appellee cites no case decided after *Reeves*, and ignores *Goosby v. Johnson & Johnson Medical, Inc.*, which supports Appellant re: Rule 56.

Cases cited by appellee do not help it. In *Josey v. John R. Hollingworth Corp.*, which predates most of the above cases, this Court actually reversed a grant of summary judgment where plaintiff — just as we have done here — presented genuine is sues of material fact as to the pretext tendered for termination. *Josey* doesn't overrule *Jackson*. *Keller v. Orix Credit Alliance Co., Inc.*, an age discrimination case, also predates most of the above-cited cases. Nowhere on p. 1108 of the *Keller* decision does this Court discuss the number of elements needed for the prima facie case. The College's arguments are simply devoid of merit or legal basis.

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(C) Appellant established her prima facie case under Jackson, Matczak, Olson and Reeves.

Appellee's argument under subheadings a. and b. at p. 21-23 of its Brief are meritless. This Honorable Court may dismiss the allegations at subheading a. as unfounded because:

(a) appellee — again — presented neither testimony nor an Affidavit from a black female librarian in this Title VII case that said person assumed Appellant's duties between the time she was fired, 3/98, and appellee's unsworn discovery answers 2 years later. Also, appellee's Supplemental Appendix contains no such testimony or Affidavit. It's unsworn discovery responses are not evidence and are false;

(b) The alleged black female is not named, adding to the unreliability of this allegation;

(c) The W-2's included in Appellant's evidence — which appellee directs this Court's attention to — prove that appellee has not been forthcoming, as one Janis Hawes' W-2 is included (A-Vol. 2(b), p. 000589) whose SS# is clearly different from that of the only other black female librarian during Appellant's tenure (Rena Hawes);

(d) Appellee withheld W-2's of at least 1 of the 2 white females who assumed Appellant's duties (the other being Jae Fisher) for the period 1997-1998 contrary to court order;

(e) Since this issue is so clearly one of genuine material fact, the district court committed reversible error.

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The suggestion that if a member of plaintiff's protected class assumed her duties negates an inference of discrimination is meritless and without foundation in law, as this Honorable Court has clearly indicated numerous times in gender and age discrimination cases. See, *Pivirotto v. Innovative Systems, Inc.*; *Showalter v. University of Pittsburgh Med. Ctr.*; *Hankins v. City of Philadelphia.*

Footnote 3 may have missed the end of the last sentence on page 12 of Appellant's Main Brief, but the pertinent citations to the record are there as to the admissions from her supervisors. That the College refuses to address the numerous citations to the record in Appellant's Main Brief underscores the lack of merit to appellee's defense. Ample evidence is cited to the record that Appellant suffered discriminatory, disparate and retaliatory treatment. *Reeves requires* the district court to consider this evidence, which it clearly did not do. Hence, Reversal must follow.

(D) Appellant established a prima facie case of retaliation.

Appellant herein cites this Court to p. 16-24 of her Main Brief. Appellee's Brief and cases cited therein contain no rebuttal here. *Drinkwater v. Union Carbide Corp.* (CCP Brief, p. 23) (as needed, College's Brief will hereinafter be referred to as CCPB) is a hostile work environment/sexual harassment case and, other than appellee's bald citation to it, it is inapposite. *Woods v. Bentson* (CCPB, p. 24) is another bald citation. Remember, appellee's Brief wholly fails to address or rebut the citations to the record in Dr. Osuala's Main Brief on this issue. Not only did Dr. Osuala satisfy

Woods, she also satisfied her burden under the following 3rd Cir. cases: *Farrell v. Planter Lifesavers Co.*, and; *Krause v. American Sterilizer Co.* Appellee's allegations as to whether a prima facie case of retaliation has been made are baseless and without support in the record.

(E) Appellant established pretext.

We are no longer surprised by appellee's unfounded claims which have no support in the record below which evidence, again, the district court impermissibly ignored contrary to *Reeves* and *Goosby*. CCP must be deemed to admit that it cannot rebut the record citations and arguments set forth at p. 12-24 of Appellant's Main Brief, as it makes no credible attempt to do so in its Brief. Its bald citation to an unpublished opinion lacking precedential value (CCPB, p. 25-28) adds nothing. Moreover, performance was not at issue in Dr. Osuala's firing. *Johnson v. Resources for Human Devel.* (CCPB, p. 27) is inapposite given our unrebutted evidence below that CCP failed to establish insubordination before the Unemployment Compensation authorities. See, p. 13 of our Main Brief and A-Vol.2(b), p. 000546-550. *Bluebeard's Castle Hotel v. Gov't. of the Virgin Islands* (CCPB, p. 27) is inapposite, involving different behavior. Moreover, reliance upon *Bluebeard*'s is misplaced as, again, the College lost before the Unemployment authorities and CCP is again tying to get around the admission of its witness, Dr. Williams (Main Brief of Appellant, p. 18). *Proud v. Stone* (CCPB, p. 28) is not a pretext case but an age discrimination case involving a person fired within a 6-mo. probation period.

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(F) The district court abused its discretion refusing to allow amendment of the Complaint and refusing to enforce F.R.C.P. 26.

The College's Brief at p. 28-34 fails to present legal argument supporting the action below. Notably, just months before deciding Dr. Osuala's case, the same district court allowed 1 white female plaintiff leave to file an amended Complaint which had not been provided with her Motion to do so (*Heimbach v. Lehigh Valley Plastics*, 99-CV-2979, E.D. Pa. 1/5/00) and then it determined that another white plaintiff could proceed with claims against individuals under Section 955(e) of the Pa. Human Relations Act (*DeStefano v. Henry Mitchell Co.*, E.D. Pa. 4/5/00). These decisions appear to be Memoranda, like the instant case's Decision, which the district court submitted for publication of its rulings to the *Legal Intelligencer's* P.I.C.S.; *Heimbach* appeared in the 1/11/00 issue of the *Legal Intelligencer*, p. 3, P.I.C.S. # 00-0003; *DeStefano* appeared in the 4/12/00 issue of the *Legal Intelligencer*, p. 1, 10, P.I.C.S. # 00-0647; the court denied our Motion to Amend 6/00.

Moreover, evidence of ongoing retaliation and disparate treatment against Dr. Osuala arose almost immediately after discovery closed 5/15/00. See our Main Brief, p. 24-25. Indeed, the "Arbitration Results" article not only warns other College professors that if they engage in speech like Dr. Osuala they risk the same consequences, but on the same page of the article we see that a sexual harassing faculty member wasn't fired but was only given a slap-on-the-wrist suspension. Were he an immigrant of Ibo descent, he would have been fired like Dr. Osuala.

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Appellee's citation to *In re Burlington Coat Factory Sec. Litig.* (CCPB, p. 29) a securities fraud case, makes no sense. This Court affirmed *Rashid v. Monteverde & Hemphill* without opinion, so we cannot discuss it. *Foman v. Davis* (CCPB, p. 30) is an estate case involving a motion to amend after the judgment had already been entered — not our case — and the U.S. Supreme Court reversed the 1st Circuit there; see 371 U.S. at 178, 182. *Sheridan v. E.I. DuPont de Nemours & Co.* CCPB, p. 30) is a sexual discrimination case — not our case — where this Court actually held the 1991 amendments to Title VIII added remedies providing for compensatory and punitive damages (100 F.3d at 1077). The other district court cases cited by appellee (CCPB, p. 30-32) predate *Reeves* and hence have neither precedential nor persuasive effect. *Gordon v. Lowell* (CCPB, p. 31) is a suit by grandparents against county and state welfare authorities, in which the court *does not* state anywhere that Section 1983 has a rigid 2-year Statute of Limitations. Again, Appellant only came into possession of the documentary evidence of ongoing discrimination, disparate treatment and retaliation by individuals after the close of discovery, just 3 months before the Decision herein appealed was rendered. *Hoy v. Angelone* (CCPB, p. 31) is a sexual harassment case where the Pa. Supreme Court recognized that punitive damages have been deemed available under Title VII (720 A.2d at 750, n. 6-7). *Whitaker v. City of Houston* (CCPB, p. 32) is only 7 pages long, and states *nowhere* that absence of a proposed amended Complaint is alone enough to deny amendment. Indeed, the court below clearly didn't follow *Whitaker* when it allowed leave to file an amended Complaint to *Heimbach*. The court below clearly abused its discretion and must be Reversed.

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Appellee's arguments re: the district court's approval of its discovery violations are devoid of merit. Clearly, production of the W-2's of the College's Ph.D.'s — wrongfully withheld contrary to Rule 26 — will further prove Dr. Osuala's case. These W-2's must be produced, as they pertain directly to a claim in her Complaint. Further, the district court has no discretion to refuse to enforce Rule 26, as noted in our Main Brief, p. 26-27, even if to do so "harms the College" as it admits will happen with enforcement of Rule 26; see our Main Brief, p. 27-28.

CONCLUSION:

Dr. Osuala hereby directs this Honorable Court to her original Conclusion (Main Brief, p. 27-28). Appellee's failure to present any meritorious rebuttal cries out for Reversal and for all of the relief Appellant has previously requested. The Decision below must fall, as it is not supportable as a matter of law.

Respectfully Submitted,
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3/4/01
Date

s/ Derrick W. Coker
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Certification of Service

I, Derrick W. Coker, Esq., Attorney for Dr. Kate Osuala, hereby Certify that I served a true and correct copy of the foregoing Appellant's Reply Brief upon the below-listed opposing counsel at the address for his office indicated below on the 4th day of March, 2001 via Certified Mail (# 7000 1530 0006 2921 4651):

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